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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATE'S COURTS

OF THE

STATE OF NEW YORK,

WITH ANNOTATIONS,

EDITED BY

WILLARD S. GIBBONS, LL.B.,

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VOL. I

ALBANY, N. Y.
W. C. LITTLE & CO.,
1905.

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Rec. Nov. 6, 1905,

PREFACE.

The preparation of a case in the Surrogate's Court is often attended with difficulty owing to the inconvenience attending the examination of the numerous volumes of reports in search of decisions bearing on the questions involved. To remedy this inconvenience it is proposed to continue the series of Surrogate's Reports, thus giving the busy practitioner a ready reference to all the important cases decided in the Surrogates' Courts of the State.

This volume continues the series from 1894, where Power's Report ended, and the notes to the cases refer to the later decisions on the points involved in those cases, including those in the appellate courts, thus giving the entire law on such points to the commencement of this year.

Trusting that this work may be favorably received, it is submitted to the legal profession.

Cherry Valley, N. Y., *April* 15, 1905.

W. S. GIBBONS.

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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SURROGATES' COURTS

OF

THE STATE OF NEW YORK.

In the Matter of Proving the Will of THOMAS CORNELL,
Deceased.

(Surrogate's Court, Ulster County, Filed April, 1893.)

1. EXECUTORS—APPLICATION BY ONE WHO HAS RENOUNCED.

An application for letters by an executor who has renounced, but has retracted the renunciation, is addressed to the discretion of the surrogate, and should be denied where such person is aged and infirm and the estate is large and complicated.

2. SAME—SUCCESSIVE.

Where the will designates a person to succeed the executor in case of his death, the surrogate has power, in such event, to issue letters to such person.

Application for letters testamentary by Catharine Ann Cornell upon revocation of her former renunciation, and by Horace G. Young, as successor of Edwin Young, deceased.

H. C. Soop, for Horace G. Young; Cardozo Bros., for Catharine Ann Cornell and Nellie L. Carpenter; A. T. Clearwater, for S. D. Coykendall, general guardian, et al.

BETTS, S.—Thomas Cornell died March 30, 1890. His will was proved April 3, 1890. Catharine Ann Cornell, one of the executors and trustees named in the will, renounced her rights thereunder April 5, 1890. Letters testamentary were issued to Edwin Young as executor and trustee under said will on the 3d day of April, 1890. A further renunciation of Catharine Ann Cornell and ratification of her previous renunciation, dated May 16, 1890, was filed the same day in this court.

After providing for the payment of his debts and funeral expenses, the third clause of the will of Thomas Cornell provides as follows:

"All the rest, residue and remainder of my said estate, real, personal and mixed, of every name or nature whatsoever, I give, devise and bequeath unto my executors and trustees herein named, and to their successors, with full power to sell all or any part of my said estate as they may deem advisable from time to time, at either public or private sale and upon such terms as they shall deem proper, and to invest and reinvest the proceeds from such sales or any moneys that may come into their hands as they think best, without regard to any statute or law regulating such investments and without any personal liability of either of my said executors, or their successors, of any such action, or for any loss or depreciation my said estate may suffer because of such investment; to be held by my said executors and their successors in trust for the following purposes and uses only, to wit:"

Then follow the various bequests and devises contained in the will, disposing of the property of the said deceased.

The sixth clause of the will of Thomas Cornell is as follows:

"I nominate, constitute and appoint my beloved wife, Catharine Ann Cornell, and my nephew, Edwin Young, of Albany, N. Y., executors and trustees of this my last will and testament, and I hereby empower my said executor, Edwin Young, in case of the death of my said wife, to nominate and appoint her successor, if he deems one necessary, otherwise to assume

the duties of this trust alone. And in case of the death of my said executor, Edwin Young, it is my will that my nephew, Horace G. Young, shall be his successor as executor and trustee of this my last will and testament, with all the authority and power that he would have if nominated and appointed by me as the others now are."

The said Edwin Young died April 21, 1893, leaving a part of said estate of Thomas Cornell unsettled, and the trust created under said will unexecuted.

An *ex parte* application is made by Horace G. Young, his successor named in said will by the clause above referred to, for letters testamentary as executor under the will of said Thomas Cornell by verified petition, and the said Horace G. Young has also taken and filed the usual oath as executor under said will.

About the same time and shortly after the application of Horace G. Young for letters testamentary, a retraction of the renunciation of Catharine Ann Cornell is filed and a request for the granting of letters testamentary on the estate of Thomas Cornell to her. At the same time a verified petition setting forth matters more fully, and asking for the same letters testamentary, is filed by said Catharine Ann Cornell.

This *ex parte* application of Catharine Ann Cornell is made, I assume, under section 2639 of the Code of Civil Procedure, which is as follows:

"A person named as executor in a will may renounce the appointment by instrument in writing, signed by him, and acknowledged or proved, and certified in like manner as a deed to be recorded in the county, or attested by one or more witnesses and proved to the satisfaction of the surrogate. Such a renunciation may be retracted by a like instrument at any time before letters testamentary or letters of administration with the will annexed have been issued to any other person in his place, or, after they have been so issued, if they have been revoked, or the person to whom they were issued has died,

or become a lunatic, and there is no other acting executor or administrator. Where a retraction is so made letters testamentary may, in the discretion of the surrogate, be issued to the person making it. An instrument specified in this section must be filed and recorded in the surrogate's office."

Thus it will be seen that this application is addressed to the discretion of the court, and the rule would seem to be a sound and just one, as many matters might occur that would make it undesirable that letters testamentary that had been renounced should subsequently be issued to the person formerly renouncing.

This estate is a large one and requires the active and intelligent direction of a person able physically to care for its varied and complicated interests.

By her petition, dated July 22, 1892, and filed in this court on the 25th day of July, 1892, in a proceeding still pending in this court, this petitioner herein, Catharine Ann Cornell, described herself as follows:

"That your petitioner is of the age of 70 years and has been twice stricken with paralysis; is bedridden and obliged to expend large sums of money for medical care and physician's attendance."

And that is given as one of the reasons for the relief there sought. The petitioner is certainly nearly one year older than she was then, and we are not advised that her condition is physically improved.

In view of these facts, it would seem not only cruel to a most estimable lady to place her in charge of a vast, complicated system of banking, railroads and real estate interests at her advanced age, but also illy caring for the interests of the other parties directly concerned in the proper administration of this large estate.

Therefore, in the exercise of a sound discretion for the reasons above given, and others, and in justice to all concerned in this estate, the application of Catharine Ann Cornell for

letters testamentary on the estate of Thomas Cornell is denied, and an order may be entered to that effect.

Now as to the application of Horace G. Young.

It is decided in an English case, *In the Goods of Lighton*, 1 Hagg. 233, cited in *Williams on Executors*, 286, 287, cited in *Dayton on Surrogates* (3d ed.), page 209: "Where a testator appoints an executor and provides that, in case of his death, another should be substituted, on the death of the original executor, although he has proved the will, the executor so substituted may be admitted to the office, if it appears to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime or afterwards."

In the *Matter of the Alexander Will*, the courts have held as follows:

"Alexander died June 13, 1873, leaving a last will, duly probated, containing the following clause: "I hereby nominate and appoint my said wife the executrix of this my will, hereby revoking all former wills by me made, and request that such male friend as she may desire shall be appointed with her as co-executor."

Letters testamentary were at once issued to the widow, and afterwards, and on or about March 2, 1874, nearly a year after probate, upon her petition one Wandell was associated with her as co-executor in pursuance of above clause of said will, and letters testamentary were granted to him *ex parte*.

A motion was made to revoke the letters testamentary of Wandell, by a creditor, as unauthorized by law, which was denied by the surrogate. The surrogate held that the executor derives his authority from the will of the testator. The statute regulates the manner in which that will shall be carried into effect, and prohibits the executor from acting until the will has been admitted to probate, and the executor, so to speak, has been judicially certified to be the person designated by the testator.

The surrogate quotes approvingly from Dayton on Surrogates (3d ed., p. 212, etc.), as follows:

"Letters testamentary are merely operative as the authenticated evidence and not at all as the foundation of the executor's title, for he derives all his interest from the will itself."

Again the surrogate says: "The statute (referring to a section of the Revised Statutes under consideration) does not provide for the appointment of executors by testators, but simply declares the duties of the surrogate with reference to executors already appointed. It does not prescribe the mode of appointment. It leaves that to be governed by the rules of the common law. The surrogate has no power of selection. He is to look to the will for the appointment, and if the designation is reasonably certain and no rule of law has been violated, he must issue letters in accordance with the testator's desire as expressed in the will." See *Matter of Alexander*, 16 Abb. Pr. (N. S.) 9.

The decision of the surrogate in this case was reversed by the General Term in *Hartnett v. Wandell*, 2 Hun, 552, mainly on the ground that the surrogate had no power to issue letters testamentary in such a case.

The Court of Appeals, however, in *Hartnett v. Wandell*, 60 N. Y. 346, reversed the General Term and affirmed the decision of the surrogate, holding as follows:

"A Surrogate's Court is to carry out and give effect to the provisions of a will and not to defeat it. The power of a testator over his estate, the care and management as well as the ultimate disposition and distribution of it, is unqualified and absolute save only as restricted and limited by statute. Within the limits and for the time allowed by law, a testator may commit the administration of his estate and the care of his property to such individuals, or succession of individuals, selected by himself or to be designated by others, as he pleases."

In *Cuthbert v. Babcock*, 2 Dem. 96, a testator gave to his wife, also his executrix, the power "to appoint some fit and

proper person to execute this my will, and hereby give her power so to do, and this notwithstanding any coverture she may be under, and if she remains my widow such appointment may be made by a last will and testament in writing, having the same obligatory force and effect as if made by me."

In the cases cited it is seen that the testator has power to direct his executor to associate some person to act with him as co-executor, without naming the person, and the exercise of the right has been held good by the court, and this is now also provided for by sections 2640 and 2641 of the Code. Also, the testator has given authority to an executrix to name an additional executrix by her will, to carry out the will of the first-named testator, and this has been held good.

Can it then be considered that in this case, where the provision of the will is so plain, directing that Horace G. Young shall succeed Edwin Young as executor and trustee of this "my last will and testament, with all the authority and power that he would have if nominated and appointed by me as the others now are," the authority of the surrogate to issue letters testamentary can be questioned?

The will of Thomas Cornell provides plainly that Horace G. Young shall succeed Edwin Young. This is a large estate with varied and complicated interests. It was esteemed of sufficient importance upon the probate of the will of Thomas Cornell that the widow, heirs-at-law and next-of-kin should join in a petition for the immediate probate of the will.

Thomas Cornell died, as before stated, March 30, 1890, and his will was proved April 3, 1890, only five days elapsing. Any occasion for haste in the probate of the will originally would seem to be equally strong and peremptory now that the estate should have a competent head to manage and control it.

In view of these facts, it is deemed necessary that the court should take prompt action to protect the interests of all the parties concerned.

Therefore, an order may be entered directing the issue of letters testamentary to Horace G. Young and letters will there-upon issue to him.

Ordered accordingly.

In the Matter of the Estate of HUBERT SLATER, Deceased.

(Surrogate's Court, Ulster County, Filed June, 1893.)

1. SALE OF REAL ESTATE—PARTIES.

An unexplained omission from the petition of the names or ages of any of the heirs at law is a jurisdictional defect.

2. SAME—CITATIONS.

Unless the notice to creditors has been published for the requisite period, the creditors must be cited as a class and the citation published.

3. SAME—PETITION.

The petition must state whether the property is occupied and, if so, must give the names of the occupants.

4. SAME—RELIEF OF PURCHASER.

The surrogate has jurisdiction to entertain an application by the purchaser to be relieved from his purchase on the ground of jurisdictional defects in the proceedings.

Proceedings to mortgage, lease or sell real estate for the payment of debts.

Application by purchaser to be relieved from his purchase and to have the sale canceled.

George Van Etten, for administrators; John F. Cloonan, for petitioner.

BETTS, S.—Hubert Slater died in this county on the 2d day of July, 1892, intestate. On the 9th day of July, 1892, a verified petition was filed by Adam Slater asking for the appoint-

ment of himself and Charles T. Coutant as administrators of the estate of the said Hubert Slater. The petition recited that the said Hubert Slater left kindred entitled to his estate whose names, relationship, ages, if under 21 years, and places of residence are as follows:

"Adam Slater, oldest brother, Ulster Park, N. Y.

"Jane E. Whittaker, sister, Woodstock, N. Y.

"John L. Slater, youngest brother, residence unknown (supposed to be in some western state).

"Eliza Slater, Walter B. Slater and William Slater, minors, niece and nephews of deceased, children of Walter Slater, a deceased brother of the intestate, residing in the town of Esopus."

On the same day letters of administration were issued to the said Adam Slater and Charles T. Coutant by this court. On the 18th day of July, 1892, a petition to advertise for claims against the estate of the intestate was duly filed in this court, and an order was entered directing the publication of the usual notice in The Kingston Weekly Freeman and Journal, claims to be presented on or before the 21st day of January, 1893. An inventory in this estate was filed September 16, 1892, showing the amount of personal property to be the sum of \$790.75. On the 24th day of October, 1892, a petition was filed in this court, verified by Adam Slater and Charles T. Coutant on October 10, 1892, asking leave to mortgage, lease or sell at public or private sale, the real estate of the deceased for the payment of his debts. Such proceedings were subsequently had in this court, that a sale of the real estate was had at public auction, and the same was struck off by the attorney for the administrators to one H.C. Higginson, of a portion of the real estate, and to one George E. Van Wagonen, of another parcel of the real estate of the deceased.

A misunderstanding having arisen between the administrators and their attorney and the purchaser, Higginson, as to the amount of Higginson's bid for a parcel of the real estate which he purchased at this sale, upon the application of the adminis-

trators and their attorney and the creditors of intestate, who were represented at the hearing, an order was entered by this court setting aside the sale to Higginson, and a private sale of that portion thereof that had been sold to Higginson was ordered to be made to one Luther Schoonmaker, whose bid was regarded of greater advantage to the estate of deceased than that of Higginson. It was claimed by the administrators and those of the creditors represented, and not denied by Higginson, that the bid of Schoonmaker was about \$400 higher than that of Higginson.

A contract was entered into between Luther Schoonmaker and the administrators and approved by this court.

This proceeding is now brought by Luther Schoonmaker to be relieved from this contract of sale and to have the same canceled and annulled.

The application is made on a verified petition filed in this office on the 1st day of June, 1893. The administrators waived the issue and service of citation upon them and consented to the immediate submission of the question to the surrogate.

Luther Schoonmaker asked to be relieved from the contract for the following reasons, among others:

First. That the petition for letters of administration duly verified by Adam Slater, filed in the surrogate's office July 9, 1892, shows that Eliza Slater, Walter B. Slater, minors, children of Walter Slater, deceased, who was a brother of intestate, are heirs-at-law of said Hubert Slater, deceased, and said minors are not made parties to this proceeding to sell the real estate of said Hubert Slater for the payment of his debts, their names do not appear in the petition presented to the surrogate, and no citation was issued to or served on them.

Second. The petition shows that the notice to creditors was running at the date of filing the petition, October 24, 1892, and the notice to present claims would not expire until January 21, 1893, and that said citation to show cause was not issued to or directed to the creditors of Hubert Slater, deceased, as a class, as required by section 2754 of the Code.

Third. That the said citation was not published as required by section 2523 of the Code.

Fourth. That the said petition contains no allegation as to whether the real estate was occupied or not.

These objections will be briefly considered in the order in which they have been presented.

As to the first objection of Luther Schoonmaker:

The original petition for letters of administration filed in this court was the petition from which the surrogate obtained his authority or jurisdiction for the appointment of administrators. The naming of the proper parties was as much a jurisdictional matter as was the death of the deceased, his dying intestate, or the value of his property, or any of the other matters that are required to be stated upon application for letters of administration.

Section 2752 of the Code of Civil Procedure, in regard to the distribution of real property of a deceased person for the payment of his debts, provides as follows:

“The petition must set forth the following matters, as nearly as the petitioner can, upon diligent inquiry, ascertain them:

“1. The unpaid debts of the decedent, and the name of each creditor or person claiming to be a creditor; . . . and the amount of the unpaid funeral expenses of the decedent, if any, and the name of any person to whom any sum is due by reason thereof.

“2. A general description of all the decedent's real property, and interest in real property, within the State, which may be disposed of as prescribed in this title; a statement of the value of each distinct parcel, whether it is improved or not, whether it is occupied or not, and, if occupied, the name of each occupant. . . . Where the petition describes an interest in real property, specified in section 2749 of this act, the value of the interest must be stated, and also the value of, and the other particulars, specified in this section, relating to the real property to which the interest attaches.

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Luther Schoonmaker asked to be relieved for the following reasons, among others:

First. That the petition for letters of administration verified by Adam Slater, filed in the surrogate's office on the 1st day of June, 1892, shows that Eliza Slater, Walter children of Walter Slater, deceased, who was the estate, are heirs-at-law of said Hubert Slater minors are not made parties to this proceeding. The estate of said Hubert Slater for the payment of names do not appear in the petition presented and no citation was issued to or served on

Second. The petition shows that the petition was running at the date of filing the petition, the notice to present claims would not expire on the 1st day of June, 1893, and that said citation to show claims or directed to the creditors of Hubert Slater, as required by section 2754 of the

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present claims has expired, creditors, whether known to exist or not, must be cited as a class and such citation must be published as required by section 2523.

It was claimed by the learned counsel for the administrators that the creditors could not oppose the administrators in a proceeding of this kind, and that, therefore, the omission to publish this notice might have been cured by the voluntary appearance of the creditors.

In opposition to this it has been decided in the Matter of the Estate of John F. Collins, an action entitled Dennis v. Jones, 1 Dem. 80, that a creditor could successfully oppose the application of the administrators in a proceeding of this kind, the court holding: "This petition is defective, on account of its unexplained omission to make certain allegations required by law. It does not, for example, disclose the age of the infant child of the testator, or whether the property which is the subject of the application is or is not improved, or whether it is or is not occupied. While it specifies certain debts and gives the names of certain creditors, it neglects to state whether the debts which are enumerated constitute all the indebtedness of the deceased, and whether the creditors mentioned include all his creditors. Section 2732 of the Code declares that in a proceeding such as this the petition must set forth, among other things, the matters here omitted. Section 2753 provides that if any of these matters cannot, upon diligent inquiry, be ascertained by the petitioner, that fact must be shown to the satisfaction of the surrogate. It does not appear that the particulars wherein this petition is defective might not have been readily ascertained. Indeed, they are fully disclosed in the order of reference which, by one of its provisions, attempts to supply the omissions of the petitioner. This attempt, however, is ineffectual, as the omissions constitute a jurisdictional defect." And see cases there cited. The court further saying: "It goes without saying that, if the surrogate acquired no jurisdiction in the first instance, the provision in the order of

reference for amending the petition by the insertion of the omitted matters is wholly ineffectual to cure its deficiencies."

Now as to the third objection of the petitioner Schoonmaker, section 2523 of the Code provides as follows:

"The surrogate may also make an order directing the service of a citation without the State, or by publication in either of the following cases: . . .

"2. Upon one or more unknown creditors, next-of-kin, legatees, heirs, devisees, or other persons included in a class, to whom a citation has been directed, designating them by a general description as prescribed in this article."

This objection was also sustained in *Kammerrer v. Ziegler*, 1 Dem. 177.

Now as to the fourth objection of the petitioner Schoonmaker:

The petition contains no allegation as to whether the real estate of deceased was occupied or not. This is plainly one of the jurisdictional requisites, as shown by subdivision 2 of section 2752 of the Code of Civil Procedure hereinbefore referred to. The reason and necessity for the rule can be plainly seen in a proceeding of this kind. The sale and the giving of a deed should be followed by possession in a purchaser. An occupant might easily be found in possession claiming title under the deceased, or under one of the numerous heirs at law of the deceased, and this court certainly would not obtain jurisdiction over the person of an occupant who had not been cited in this proceeding. This has been held in numerous cases to be jurisdictional.

There are various other objections which are raised by the learned counsel of the petitioner both to the petition and to the subsequent proceedings that have been had in this matter. Some of these objections may have been cured and others not, by the evidence that has been taken and the proceedings that have been had. It seems, however, that the four objections chiefly considered all go to the jurisdiction of this court, and that a good title would not be obtained by the purchaser under this sale.

The surrogate has jurisdiction to entertain an application of the kind made by this purchaser, and it is so decided in the *Matter of Lynch*, 67 How. 436, and *Estate of Evan John*, 21 Civ. Pro. 326. And in the *Matter of Dolan*, 88 N. Y. 309, although decided adversely to the petitioner, yet the court decided that he had the right to make the application by entertaining the appeal. In that case the court considered the objections of the petitioner and overruled each of them separately.

There has been so much litigation in this proceeding, and the proceeding has been so long, that it is to be regretted that the sale could not be followed by a valid deed which would entitle the purchaser to possession.

The petitioner in this case asks for costs. I do not feel disposed to grant costs. The petition of Luther Schoonmaker, asking to be relieved from his contract of sale and to have the same canceled and annulled, is granted, and an order may be entered to that effect without costs to either party.

Ordered accordingly.

Note.—A purchaser at a sale of land of a decedent for the payment of debts will not be required to complete his purchase where the executor or administrator neglected to advertise for claims and a citation directed generally to all creditors was not published as required by section 2523 of the Code. (*Matter of Georgi*, 44 App. Div. 180.)

In the Matter of **GEORGE METCALFE**, as Executor, etc.

(*Surrogate's Court, Westchester County, Filed January, 1894.*)

1. **SURROGATES—JURISDICTION.**

A surrogate has jurisdiction to construe a will on an accounting.

2. **WILL—LIFE ESTATE.**

A bequest of the use of property to decedent's husband during his life, followed by the expression of a wish that at his death the property be divided between nephews and nieces, gives a mere life estate to the husband, with remainder to the nephews and nieces.

Application to compel an accounting by an executor.

Robert H. M. Dawborn, an heir of the deceased, claiming to be interested in her estate under her last will and testament, cited said executor to show cause why he should not render an account. On the return day of the citation he claimed to show cause, which was to the effect that all of the estate, except some specific bequests which the legatees had received, belonged to him by virtue of the will, under its first clause, which reads as follows: "After all my lawful debts are paid, I give to my husband, George Metcalfe, the use of all my property, both real and personal. At the death of my husband, George Metcalfe, I wish my property to be equally divided between my nephews and nieces," naming them, among whom was the petitioner. It further appears that the property of the deceased consisted of a farm of land, a number of shares of railroad stock, and an indebtedness of \$1,000 due to her. Objection is made on behalf of the petitioner to the effect that this court has no power to construe the will.

Charles J. Banks, for petitioner; D. J. M. O'Callaghan, for executor.

COFFIN, S.—It is well settled that the surrogate has jurisdiction to construe a will on accounting, and this is such a proceeding.

The will gives the use of all the property, real and personal, to the husband, in effect, for life. It does not, either in terms or by fair inference, give him the property, but only its use. It does not "leave" it to him to be enjoyed by him for his sole use and benefit, as in the case of *Campbell v. Beaumont*, 91 N. Y. 464, cited by the executor's counsel, nor can we anywhere gather from the will any such intention. It cannot be pretended that the title to the farm would pass under the provisions for its use, and the word embraces and is applied to both kinds of property. If it will not pass the title to the farm, how can it be held that it

does so as to the personalty? Can we so construe it as to give it a double meaning? Evidently it was used in a single and ordinary sense. The word "wish," as used in the following sentence, making a final disposition after the death of the husband, is sometimes construed as a mere precatory word, and sometimes as equivalent to the words "will" or "direct." Here it appears to me to have been employed in the sense of the latter word. It is accordingly determined that the executor has a life estate only with remainder to the nephews and nieces. This appears to have been the intention of the testatrix as gathered from the will, which was drawn by herself.

The right to use the implements and machinery on the farm in conducting farming operations by the husband is a question for subsequent consideration.

It must, therefore, be held that sufficient cause has not been shown why the executor should not file his account, and the further order provided by statute in such case may now be entered.

Ordered accordingly.

Note.—A surrogate has jurisdiction to construe a will upon an accounting. (Matter of Young, 17 Misc. 680; Baldwin v. Smith, 3 App. Div. 350.) And in proceedings for probate of a will. (Matter of Bogart, 43 App. Div. 582.) But not in proceedings to revoke probate. (Matter of De Hass, 24 Misc. 420.) But he cannot construe a provision relating exclusively to real estate. (Matter of Schweigert, 17 Misc. 186.)

In the Matter of the Estate of JOHN MORTON, Deceased.

(Surrogate's Court, Monroe County, Filed February, 1894.)

1. EXECUTORS—CLAIMS MUST BE PRESENTED.

Knowledge of the executor or administrator of the existence of claims against the estate does not avoid the necessity of due presentation of such claims.

2. SAME—PRESENTATION.

Claims must be presented in some writing stating the nature and amount of the claim, the name of the owner, and demanding payment.

3. SAME—RIGHTS OF CLAIMANT.

Where a claim is not presented within a reasonable time after publication of the notice to creditors, the claimant cannot complain of a disposition of the personalty made with the consent of the persons interested.

Proceeding by judgment creditor to compel payment of his claim.

W. E. Davis, for petitioner; Louis H. Jack, for administratrix.

ADLINGTON, S.—John Morton died on the 23d day of March, 1883. Shortly before his death verdicts had been rendered against him in two actions pending in the Supreme Court, but judgment had not been entered thereon at the time of his death.

On August 10th, 1883, judgments were entered on said verdicts against said Morton, one for \$219.01, and the other for \$374.02. The judgments, however, were irregular in that no memorandum of the defendant's death was made, as required by section 1210 of the Code of Civil Procedure.

On July 7th, 1884, said judgments were assigned by the plaintiff in the actions to one Sanford, and on October 1st, 1892, by said Sanford to Benjamin C. Miller, the petitioner herein.

In November, 1892, on Miller's application, the entry of the judgments was corrected to conform to the provisions of the Code just mentioned, and thereafter this proceeding was begun

by said Miller to compel the payment of said judgments by Morton's administrator.

Letters of administration on decedent's estate were granted to his widow on July 12th, 1883, and she duly published the statutory notice for presentation of claims by creditors, and the six months' publication of such notice ended January 5th, 1885.

In the summer of 1883 or 1884, and before the time limited by such notice for the presentation of claims, the attorney for the plaintiff in the aforesaid actions called on the administrator, as he says, "in reference to the judgments." His testimony is that he talked with her in regard to the claims growing out of the judgments, and tried to arrange with her for their payment; that he told her the amount of them, which he thinks he had there upon a slip of paper, and that she said that she knew nothing about the judgments, though she had known of the litigation, and referred him to her brother, an attorney. Soon afterward the judgments were assigned, and neither assignee ever presented his claim thereon to the administrator, or took any steps to collect the same, until Miller began the pending proceeding.

Assets to the amount of nearly \$4,000 came into the hands of the administrator, and, after paying the debts of decedent, she expended nearly the whole sum remaining, about \$3,000, in the purchase of a cemetery lot, the erection of a costly monument to the decedent, in improvements upon real estate left by him, and advances to the next of kin. This was all done with the consent of the next of kin, and pursuant to an agreement between them and the administrator, and in entire good faith.

The petitioner maintains that as against him these outlays and advances should be disallowed, and the administrator held to have the moneys on hand for the payment of his claim. I do not think his contention can be maintained. He took the claim subject to any defense arising from the acts or laches of his predecessors in interest. An administrator who has conformed to the requirements of the statute, and has published the pre-

scribed notice, has a right to assume that all persons having claims against the decedent, which they intend to enforce, have presented the same and demanded payment thereof; and if he thereafter distributes the assets to those entitled to them, or expends them in a manner to which they have given their approval and consent, he should not be accountable for such assets to a creditor who never presented his claim or took any legal proceeding to collect it while the funds were in the administrator's hands. *O'Conner v. Gifford*, 117 N. Y. 275, 283; *Erwin v. Loper*, 43 id. 521.

An administrator's knowledge of the existence of a claim against the estate does not avoid the necessity of its due presentation. *Livingston v. Gardner*, 4 Redf. 517, note; *Jones v. Lightfoot*, 10 Ala. 17-24; *Pfeiffer v. Suss*, 73 Mo. 252.

Unless, therefore, the claim arising out of these judgments was duly exhibited or presented to the administrator within a reasonable time after the publication of the statutory notice, the petitioner cannot complain of the disposition which, with the consent of the persons interested, has been made of the personal estate of Mr. Morton.

The petitioner's counsel relies on the conversation between the plaintiff's attorney and Mrs. Morton, heretofore mentioned, as a sufficient exhibition or presentation of the claim under the statute. There is some doubt whether, under his general retainer to prosecute the action, the attorney had authority to exhibit or present this claim to the administrator, and it is also doubtful whether the claim could properly be presented and recognized as "a debt to be paid in the course of administration" until after the entry and docket of the judgments had been made to conform to section 1210 of the Code of Civil Procedure.

But, assuming for present purposes that these doubts are resolved in favor of the petitioner, still I do not think that what occurred between Mr. Jones and Mrs. Morton was a legal presentation of the claim, even conceding the correctness of the former's version of the conversation, a point which is disputed by the administrator.

The creditor is required, by the notice given under the statute, to exhibit his claim, with the vouchers thereof, to the executor or administrator, who may, if he choose, require the claim to be supported by the affidavit of the claimant that it is justly due, that no payments have been made thereon, and that there are no offsets to it. Rev. Stat. part 2, chap. 6, tit. 3, art. 2, secs. 34, 35.

The statute plainly intends that the claim shall be presented or exhibited in some writing, stating its nature and amount, the owner's name, and demanding its payment. The personal representative of the estate is then in possession of information which will enable him to act intelligently, and either to admit the claim or take such steps to protect the estate against it as he shall deem prudent and necessary. This is the construction placed on the statute by the courts of this State and by those of other States in whose statutes similar provisions and regulations are found. *Cruikshank v. Cruikshank*, 9 How. Pr. 350, 351; *King v. Todd*, 27 Abb. N. C. 149, 150; *Robert v. Ditmas*, 7 Wend. 523; *Gansevoort v. Nelson*, 6 Hill, 392; *McDowell v. Jones*, 58 Ala. 35; *Farris v. Stoutz*, 78 id. 134; *Pfeiffer v. Suss*, 73 Mo. 252.

There is some evidence which tends to show that a larger sum might have been realized from the decedent's interest in the property of the firm of which he was a member at the time of his death, but the disappearance, or destruction, of the firm books makes an accounting with the surviving partner impracticable, and the testimony is not sufficiently definite to warrant a finding that the administrator should be charged with any specific sum on account of the partnership business, except the \$200 received from Mr. Fisk for woolen cloth sold to him.

There will be an unexpended balance in the administrator's hands of about \$500, and that may be decreed to be applied on the petitioner's claim, after deducting the expenses of this accounting.

Ordered accordingly.

In the Matter of Petitions of ELLA C. PATON, as General Guardian of HERBERT H. DICKSON *et al.*, Infants.

(*Surrogate's Court, Westchester County, Filed February, 1894.*)

LEGACY—GUARDIAN.

An application by the general guardian of an infant legatee, made after the expiration of one year, for payment to him of the legacy and authority to apply it to the infant's support, cannot be granted under section 2722 of the Code, as the general guardian is not a person entitled to the legacy within the meaning of that section.

The petitions are substantially alike except as to amounts asked for. They set forth that the petitioner was, on the 3rd day of May, 1893, duly appointed by the surrogate of New York guardian of the persons and property of said infants, who were residents of that county, and are under fourteen years of age; that upon such appointment she gave the necessary bond to each of said infants in a penalty of \$8,000; that said minors are legatees under the will of Sarah H. C. Wilson, late of Yonkers, to the extent of about \$4,000 each; that said will was admitted to probate in Westchester county on the 14th day of September, 1892, and letters issued to John M. Cornell, the executor, on the same day; that said executor has assets sufficient to pay said legacies or a portion thereof; that said minors have no property or means of support other than said legacies; that their mother is dead and their father is possessed of no property or income except what is derived from his daily labor, and is unable to care for and support them; that the surrogate of Westchester, by an order made in July, 1893, directed the executor to pay to the petitioner, on account of the legacy to said Margerite, the sum of \$1,000. And the prayer of the petitioner is that said legacies, or such parts thereof as the executor may have funds in hand sufficient to pay, may be ordered to be paid to her, and that she may be authorized to apply the same to the support of said minors. The executor files answers in which he admits the

facts stated and alleges that he has in hand sufficient funds to pay on account of the legacy to Margerite \$1,860, and on that to Herbert the sum of \$2,860, on account thereof, without diminishing the amount in his hands requisite for the payment of debts and expenses against the estate, of all legacies which are entitled to priority over the claim of said infants and of the like proportionate part of all legacies or distributive shares of the same class. The petitions were verified in the State of South Dakota.

Eugene K. Sackett, for petitioner; Lemuel Skidmore, for executor.

COFFIN, S.— Courts are watchful in the protection of minors and their interests. In general, a guardian may not, without permission of court, encroach upon the *corpus* of the trust estate in his expenditures for the ward's benefit. But where a proper case is made out, upon application to the court, such permission might be granted. These are common-law principles, and the Court of Chancery had superior control over minors and their guardians. When that court was abolished, its powers in this regard were devolved upon the Supreme Court, while most of them were long since conferred upon and exercised by the Surrogate's Courts. By section 2846 of the Code a surrogate may make an order directing the application, by the guardian of the infant's property, to the support and education of the infant of such a sum as to the surrogate seems proper out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal. Again, section 2746, in the article on accounting, etc., provides that where a legacy or distributive share is payable to an infant the decree may, in the discretion of the Surrogate's Court, direct it, or so much of it as may be necessary, to be paid to his general guardian, to be applied to his support and education, and the court may, in its discretion, by its decree, direct any legacy not paid or applied as aforesaid,

which is payable to an infant, to be paid to the general guardian on his executing and depositing with the surrogate a bond to such infant in double the amount of such legacy, conditioned that he will faithfully apply such legacy, etc. The court may then, in its discretion, from time to time authorize or direct the guardian to expend such part of the legacy in the support, maintenance and education of such infant as it deems necessary. Section 2722 provides that a petition may be presented to the Surrogate's Court, praying for a decree directing an executor to pay the petitioner's claim, by a person entitled to a legacy, at any time after one year has expired since letters were granted. The surrogate, on the return of a citation issued thereupon, must make such a decree in the premises as justice requires, but must dismiss the petition without prejudice to an action or an accounting in behalf of the petitioner where it is not proved to his satisfaction that there is money or other personal property of the estate applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction. By section 2723 it is provided that the surrogate may in his discretion, entertain such a petition at any time after letters are issued, although a year has not expired; and that if in such a case it appears that a decree for payment may be made as prescribed in the last section and that the amount of money and the value of the other property in the hands of the executor applicable to the payment of debts, legacies and expenses exceed by at least one-third the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim, and of all legacies of the same class, and that the payment or satisfaction of the legacy or some part thereof is necessary for the support or education of the petitioner, the surrogate may make a decree directing payment or satisfaction accordingly, on the filing of a bond as therein specified.

It is not entirely clear which of these sections of the Code is

invoked to support these applications, as the prayers of the petitioner and allegations of both petitions and answers indicate that features of both the last-mentioned sections were had in view in their preparation; but it may fairly be assumed to be section 2722, for the next section is applicable only to a case where the application is made before the expiration of the year. Then that section proceeds to define what may be done "in such a case." Here the year has long since expired, and hence this is not "such a case." Whether it be that, or the section immediately preceding, the petition is not presented "by a person entitled to a legacy . . . under the will." The general guardian is not such a person, and it was held in *Peyser v. Wendt*, 2 Dem. 221, that an assignee of a legatee was not such a person, and his application could not be entertained, but it is not proposed here to further consider that question.

It would seem that the petitions and answers were prepared with both sections in view, for while the petitions state that the executor has sufficient assets in hand applicable to the payment of the legacies to pay the same or portions thereof, and the prayer is for an order directing the executor to pay said legacies, or such parts thereof as he may have funds in hand sufficient to pay without injuriously affecting the rights of others entitled to priority or equality of payment, and authorizing the petitioner to apply the same to the support of said minors, the answer admits sufficient funds in hand to pay to or for each the sum of \$2,860, including the \$1,000 paid on account of Margerite's interest, without diminishing the amount in hand requisite for the payment of debts and expenses against the estate, of all legacies which are entitled to priority over the claims of said minors, and the like proportionate part of all legacies or distributive shares of the same class. It will be observed that nowhere is there any allegation that the amount of money and the value of the other property in the hands of the executor exceed, by at least one-third, the amount of all known debts, claims, legacies, etc., as provided by section 2723, and the preceding

section makes no provision for the application of the legacy, or a part thereof, for the support or education of infants.

The surrogate has no power to authorize an encroachment upon the *corpus* of the estate, except in the cases and in the manner expressly conferred by statute. In this case he cannot do so under section 2846, for the reason that it is based upon the assumption that the guardian already has the fund in hand. Nor can he act under the authority conferred by section 2746, because that is to be exercised only in an accounting proceeding; nor under section 2722, for the reason that no such power is conferred by its provisions; nor under section 2723, because this is not a proceeding under that section.

As stated, more than a year has expired since letters testamentary were issued, and these infants, or any person in their behalf, may cite the executor to account, and in the decree entered in that proceeding the surrogate could determine what provision, if any, should be made for them. As there need be no delay in instituting such a proceeding, there can be no serious injury likely to result to these children from the dismissal of these proceedings.

It may be proper to remark that the facts stated are not sufficient to enable the court to judge understandingly what allowance would be proper to make, had it the power to make it now. It is not stated when the legacies become due, whether there is any income derivable therefrom, what their respective ages are, except that they are under fourteen, in what labor their father is employed, what wages he receives, what their social standing and consequent needs may be, nor what disposition has been made of the \$1,000 paid. The legacies are stated to be about \$4,000 each, and it is sought through the order of the court that nearly three-quarters of the fund, including what has already been allowed on behalf of Margerite, be paid to the guardian by the executor, and that even without the security to be furnished in such case on an accounting.

The fact that the \$1,000 paid for the support of one of the

minors has been expended in six months gives rise to the suspicion of a misapplication thereof, and this suspicion is intensified by the application now made for \$1,860 more. At this rate the funds would soon be dissipated. If the legacies had been properly invested they would have produced an income annually of perhaps \$200 each. This, with what the father could contribute from his earnings, ought to be sufficient for a comfortable support of infants in their apparent station in life. Many a father in like cases does it without any aid whatever.

The petitions should be dismissed without prejudice to an action or an accounting in behalf of the petitioner.

Ordered accordingly.

In the Matter of the Application of JOHN J. MANSFIELD *et al.*,
for Payment of Legacies by the Executor.

(*Surrogate's Court, Westchester County, Filed February, 1894.*)

1. EXECUTORS—PAYMENT OF LEGACIES.

Section 2722 of the Code does not authorize the payment of part of a legacy, except where there are not sufficient funds to pay all, and there has to be an abatement of legacies or a *pro rata* share of the debts fixed.

2. SAME.

An application for payment of a legacy cannot be granted where the facts on which it is based are disputed by the answer.

The testatrix, by her will, after making some specific bequests, and providing for the erection of a monument, the expense to be paid out of her personal estate, gave all the rest and residue of her personal estate to the petitioners. She then ordered and directed her executors to sell and convey her real estate, and to divide and distribute the proceeds, in certain shares, among certain relatives of her deceased husband, among whom the pe-

tioners were not included. These latter, in their petition for the payment of their claims, show that the amount of the inventory of the personal estate, as filed, is \$27,906.43, and that the real estate so ordered sold is of the value of \$18,000; that they have each been paid \$2,500 on account of their respective legacies, and that the debts and estimated expenses of administration will not exceed about \$7,500, and they ask for a decree directing the executor to pay to each of them the further sum of \$9,000, claiming that the real estate was converted into personal by the will, and thereby subjected equally with the other personal property to the payment of debts and expenses. The verified answer of the executor, among other things, refers to the will, and denies that the proceeds of the real estate are subjected equally with other personal property to the payment of debts and expenses, and alleges that said personal estate is the primary fund for the payment thereof.

Remsen & Parsons, for petitioners; M. G. Hart, for executor.

COFFIN, S.—Neither party seems to have had a very strict regard to the provisions of section 2722 (formerly 2717 and 2718) of the Code in preparing the petition and answer. Each of the petitioners, however, states his and her claim at \$9,000. The answer, in effect, sets forth facts calculated to show that it is doubtful whether the petitioners' claims are valid and legal to the extent claimed, and also substantially denying their validity or legality as a whole. The facts gathered from the petition show that the personal estate was valued at \$27,906.43

Debts and expenses, estimated, at.....	\$7,500	
Paid on account of petitioners' legacies..	5,000	
		<hr/> 12,500.00

Leaving the residue, from inventory, at..... \$15,406.43

One-half of which is 7,703.21

or \$1,296.79 less than is claimed by each. This deficiency is sought to be supplied by taking the necessary amounts from the

proceeds of the sale of the real estate, which it is claimed will be legal assets when the actual conversion shall have been effected, which has not as yet been done, and which proceeds will be equally liable with the residue of the personal estate for the payment of debts and expenses of administration. The effect of making the decree for the payment to each petitioner of the sum now asked would be to relieve the strictly personal estate from its liability to the extent of about \$2,600, and shift it to the proceeds of the sale of the real estate. Can this be done in this case?

Ordinarily, the rule is well established that an equitable conversion of realty into personalty takes effect at the death of the testator, and the proceeds are to be regarded as money from that period, and, where no other direction for their disposition is given, may be applied to the payment of debts and expenses of administration, the same as if they had been money in hand at the time of his death.

But where real estate is directed to be sold only for a certain purpose it is converted only for the purpose of the will, and that a devise for such a purpose, *i. e.*, the payment of certain legacies, does not throw open the fund to simple contract creditors, where there is sufficient personal property to pay the debts. *Gibbs v. Ougier*, 12 Ves. 413. So, where a deviser directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale for the convenience of division; and A. and B. take their several interests in money and not land. *Bogert v. Hertell*, 4 Hill, 492, citing *Smith v. Claxton*, 4 Mad. 484. To hold otherwise would be to ignore and subvert the expressed intention of the testatrix.

This is the sole question discussed in the brief submitted.

These principles of the law on the subject are not here stated for the purpose of a decision of the question, but in order to show that there is some matter I cannot now try, as well as to show that it is not proved to my satisfaction that there is money or other personal property of the estate, applicable to the pay-

ment or satisfaction of the petitioners' claims, which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction. See Matter of Hedding M. E. Ch., 35 Hun, 315.

Some of the debts and the expenses of administration, it is understood, have not been fully paid, and the decree asked for would thus injuriously affect the rights of others entitled to priority of payment.

There seems to be no provision in the section for the payment of a part of the claim except where there is not sufficient funds of the estate to pay all, and there has to be an abatement of legacies or a *pro rata* share of the debts fixed, in which cases the decree may direct payment of their just proportional parts where the facts are agreed upon, but where they are in dispute they could only be ascertained on an accounting, which cannot be had in this proceeding. Matter of Hedding M. E. Ch., 35 Hun, 315. A "just proportional part" cannot be arrived at by mere approximation, estimate, guess-work. However, that is not this case. The claim is for \$9,000 by each, and there is not sufficient money to pay them without resort to the proceeds of the sale of the realty, and I am not satisfied that such resort can be had, and, therefore, the petition must be dismissed, without prejudice to an action or an accounting in behalf of the petitioners. Such an accounting, if desired, may be at once had on application therefor.

Decreed accordingly.

Matter of the Estate of ALBERT H. ROBBINS, Deceased.

(Surrogate's Court, Orange County, Filed February, 1894.)

1. LIMITATION.

Section 2739 of the Code, suspending the operation of the statute of limitations on a debt due the executor until his final accounting, does not apply to a claim of a third party assigned to the executor.

2. SAME.

Claims against an estate are barred by the statute in seven years and six months from their maturity, although they have been duly presented to and admitted by the executor, and can only be renewed by a payment, acknowledgment or promise in writing, signed by him.

3. SAME—ACKNOWLEDGMENT.

A petition by the executor for leave to sell a legacy due the decedent, which states the names of creditors and the nature of their claims, is a sufficient acknowledgment to stay the running of the statute as to them.

Judicial settlement of accounts.

J. W. Gott, for administrator; Wm. D. Mills, for various creditors; F. H. Cassedy, special guardian, for infant children of deceased.

COLEMAN, S.—This is a proceeding for a judicial settlement of the accounts of the administrator. The deceased died in 1886, and Charles M. Thompson, the administrator, was appointed in March of that year. The available assets at that time amounted to \$310.40, \$150 of which was set apart to the widow, \$95 paid for funeral expenses, and the balance, \$65.40, was paid to the widow July 14, 1890, upon certain claims made by her against the estate. The only other property belonging to the estate was a legacy of \$2,500 payable to the deceased upon the death of his mother, who, at his death, was upwards of eighty years of age. By reason of the great age of the mother of the deceased the administrator did not, by sale, convert it into money at once, but on the 28th day of July, 1890, the adminis-

trator filed a petition in this court, setting out the names of the creditors and the nature of their claims, amounting in all to about \$7,000, and prayed that such creditors be cited to show cause, etc., why an order should not be made directing the sale of said legacy. Objection was made by the most of the creditors to a sale, under the circumstances, because of the probability of an early maturity and the sacrifice incident to a forced sale. The matter rested until in July, 1893, when the administrator again moved, the life tenant being still living, and obtained an order for a sale, and the legacy was sold shortly thereafter and converted into cash. On the 1st day of November, 1893, the administrator filed a petition for a judicial settlement and a citation has been served on all the creditors and next of kin. Intervening the filing of the petition of July 28, 1890, and that of November 1, 1893, a period of more than seven and a half years has elapsed since the greater part of said indebtedness became due and payable, and upon this settlement the special guardian of the minor next of kin objects to the payment of such claims upon the ground that they are now barred by the Statute of Limitations. No question is made but that all of said claims have been regularly presented to and admitted by the administrator. The claim formerly owned by Mrs. Robbins, the widow, was assigned by her on the 14th day of July, 1890, to Mr. Thompson, the administrator, and it is now urged in his behalf that by section 2739 of the Code of Civil Procedure the operation of the statute was suspended as to such claims until this judicial accounting. The language of this section only speaks of "a debt due from the decedent to the accounting party," and does not, therefore, include a debt of the decedent to a third party which has been assigned to the administrator, notwithstanding the fact, as urged by the counsel for Mr. Thompson, that he could not bring an action for the debt against himself. He had other remedies. It rested entirely with himself when he should institute the proceedings for a judicial settlement and in such proceedings establish claims owned by him.

The law is well settled that debts against decedents become barred by the Statute of Limitations in six years and eighteen months from their maturity, notwithstanding their presentation to and admission by the representative of the estate. *Butler v. Johnson*, 111 N. Y. 204. To renew or continue the contract after this period there must be "an acknowledgment or promise, contained in a writing signed by the party to be charged thereby" (sec. 395, Code Civ. Pro.), or there must have been a payment made thereon within that period by the decedent, or by his executor or administrator. *McLaren v. McMartin*, 36 N. Y. 88. No payment was made on any of these claims by the decedent nor by the administrator, except the payment of sixty-five dollars and forty cents made July 14, 1890, by the administrator to Mrs. Robbins. It is stated in the receipt signed by Mrs. Robbins that it was received "as a part payment of my claim against said estate." And no written acknowledgment or promise to pay has been made, unless it is found in the petition filed for leave to sell the legacy. This petition fully set forth the names of the creditors and the nature of their claims; it was signed by the administrator and prayed that a citation issue to such creditors, which was done, and they were served. The next of kin were not made parties to this proceeding.

I do not think the proceeding to sell the legacy gave the creditors any special claim upon the fund realized from the sale. The administrator might have made a perfectly valid sale without the surrogate's order, but he could also avail himself of any protection which an order, made upon notice, might afford him. The allegations of the petition may, however, work other results than that for which it was primarily intended. There is an acknowledgment to the persons made parties to the proceeding of their claim against the estate, and it is in writing signed by the party who legally represented the debtor, and an acknowledgment upon which it may reasonably be claimed that they might rest without bringing their action. Such an act the ad-

administrator might legally perform, and the next of kin are bound by its legal consequences.

The case of *Visscher v. Wesley*, 3 Dem. 301, has been cited as sustaining an opposite view of the law. In that case an administrator had been required, at the instance of a creditor, to render an account, and in his answer to such application the administrator alleged that a certain judgment was entitled to priority of payment. Surrogate *ROLLINS* held, in a subsequent proceeding for a judicial settlement, that the written answer in the former proceeding "was not such an acknowledgment of that judgment as to give it new vitality." And the learned surrogate seems to be of the opinion that it was not such an acknowledgment because the judgment creditor was not a party to the proceeding in which the written acknowledgment was made, and that his action was not influenced thereby, quoting authorities showing that the acknowledgment must be made to the debtor, or to some one representing him. The case may, therefore, be considered an authority sustaining the view that to a party to the proceeding the acknowledgment would have been good, and such is my opinion.

The administrator cannot, however, avail himself of his own acknowledgment, and thereby continue his claim which had been previously assigned to him by Mrs. Robbins, but I am of the opinion that the payment made by him to her upon this claim was sufficient to arrest the running of the statute.

My conclusion is that the claims of the creditors mentioned in the administrator's account, and those which have been assigned to him, are still valid against the estate of the deceased.

Decreed accordingly.

In the Matter of the Appraisal of the Property of GRACE C.
STIGER, Deceased.

(Surrogate's Court, Kings County, Filed February, 1894.)

TRANSFER TAX.

The interest of an infant decedent in a fund realized on a sale in partition is not real estate, and, therefore, is not exempt from taxation by section 2 of the Transfer Tax Act of 1892.

Appeal from decree of Surrogate's Court confirming report of appraiser and assessing and fixing the cash value of the property of Grace C. Stiger, deceased, and the tax to which the same is liable.

William B. Stiger, for appellant; James W. Ridgway, district attorney (Robert B. Bach, of counsel), for respondent in person.

ABBOTT, S.— Grace C. Stiger, formerly a resident of Brooklyn, died August 24, 1892, at the age of fifteen years and eight months, possessed of certain personal property and seized of certain real estate.

Among other property of which said Grace C. Stiger was the owner at the time of her decease was one-third interest in a fund on deposit in the United States Trust Company to the credit of a certain partition suit to which the said Grace was a party.

The fund with accrued interest amounts to the sum of \$76,936.26, of which \$21,667.19 is accumulated interest, and \$55,269.07 is the original amount paid in, and represents the share or interest of infants of the proceeds of sale of real property in partition. The value of Grace's interest in the fund is \$25,645.42.

Decedent left surviving, as her only next of kin and heirs at law, a father and brother and sister, her mother having died May 3, 1878.

It is contended by the appellant that this fund, being the proceeds of sale of real property and passing to the heirs at law and not the next of kin of the intestate, is not personal property under section 2 of the act in relation to taxable transfers of property.

I am unable to agree with the appellant in his contention.

Chapter 399 of the Laws of 1892 provides:

"Sec. 1. Taxable transfers.—A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property in the following cases:

"1. When the transfer is, . . . by the intestate laws of this State, from any person dying seized or possessed of the property while a resident of the State. . . .

"Section 2. Exceptions and limitations. When the property or any beneficial interest therein passes by any such transfer to or for the use of any father . . . brother, sister . . . of such decedent, grantor, donor or vendor . . . such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more, in which case it shall be taxable under this act at the rate of one per centum upon the clear market value of such property."

In the construction of statutory provisions imposing taxes, the law does not favor such an interpretation of doubtful or ambiguous provisions as will have the effect to exempt the property from the operation of the act, unless such an intention of the legislature shall clearly appear. *People ex rel. Westchester F. Ins. Co. v. Davenport*, 91 N. Y. 574; *People ex rel. Savings Bank of New London v. Coleman*, 135 id. 231.

Therefore, we must find in the terms of the Transfer Tax Act a clear intention to exempt the property in question.

The rule of law which has created the fiction that, under certain circumstances and for certain purposes, the proceeds of sale

of real property shall continue to be regarded as real property has been adopted by our courts, which have followed the rule of the common law.

In *Horton v. McCoy*, 47 N. Y. 21, Church, Ch. J., writing the opinion, holds that the share of an infant of real property of proceeds of sale in partition retains its character of real property during the minority of the infant, so that such proceeds descend to the heirs at law of such infant, and not to his next of kin or to the legatees of infants over eighteen years of age.

On the other hand, if the property be sold by executors under a direction contained in the will of a testator, there is effected an equitable conversion, and an infant's share of such proceeds of sale is personal property, passes to legatees under the will of an infant over eighteen years of age, or to the next of kin and not the heirs at law of an infant dying intestate.

The infant, being seized of land in his own right, had at common law absolutely no power to sell or dispose of the same or to alter its character.

"The Court of Chancery entertained jurisdiction in partition at an early period in England, partly to meet cases not cognizable in courts of law, and has continued ever since to exercise such jurisdiction, although the jurisdiction of courts of law has been greatly enlarged by statute. Story's Eq. Juris. secs. 646-648.

"Until the statute of the 13th and 14th Victoria, the interest of infants in real estate was not sold absolutely in such proceedings, but they were allowed a day after they attained twenty-one years of age to show cause against the decree. Id. sec. 652. Since the statute the infant is declared a trustee of the property, and the court is authorized by this statute to dispose of all interests held in trust. *Bowra v. Wright*, 3 Eng. L. & Eq. 190. But I can find no authority departing from the rule before adverted to, of impressing the proceeds thus obtained with the character of real estate until the majority of the infant."

It now remains for us to determine whether, in the light of the foregoing authority, it was the intention of the legislature to exempt such proceeds of sale of real property from the transfer tax.

As we have seen, the law does not favor exemptions.

The Transfer Tax Act taxes, not the property, but the individual who receives the property as a condition to the transfer thereof to him.

In the case under consideration what kind of property is it which passes to the heirs at law of the intestate? Certainly not real property. What they receive is money. The tax being upon the devolution, transfer or passing of title of the property, it would be an extraordinary extension of the fiction which regards personal property as real property for certain purposes to hold that the legislature intended to regard it as real property for the purpose of exemption when it says, "such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more," etc.

It is evident that the exemption was not intended for the benefit of the heirs at law as such, because, among the classes specified in the exemption clause, the individuals constituting the heirs at law and next of kin are always the same, and their interests in real property under the law of descents are in most cases identical with their interests as next of kin under the statute of distribution.

So that the reason for the exemption must be looked for in the kind of property the transfer of which is exempted.

This is real property, and the reason for its exemption probably is the fact that it already largely contributes to the payment of all taxes.

If the fund in question is to be exempted as real property under the provision above quoted, it should be contended with greater force that the fund is subject to assessment and taxation as real property under the general laws providing for taxation

of real property. The fund should be listed, assessed and taxed like other parcels of real property.

The effect of exempting the fund in question would be to twice exempt the interest of the infant in the real property sold. The real property sold is exempted from the tax as real property, and the fund with which it was purchased, which before was personal property and subject to the tax, now becomes real property and is exempt, so that the rule contended for would take out from the aggregate fund of personal property otherwise taxable just the amount paid for the real property.

I am of the opinion that the fund in question is not exempt from the tax.

Decree affirmed.

In the Matter of the Judicial Settlement of the Accounts of the
Temporary Administrator of CLARA M. EGAN, Deceased.

(*Surrogate's Court, New York County, Filed February, 1894.*)

ADMINISTRATOR—COMMISSIONS.

A temporary administrator is entitled to commissions on property specifically bequeathed.

Judicial settlement of the accounts of the temporary administrator of Clara M. Egan, deceased.

George M. Barry, for temporary administrator; Redfield & Redfield, for legatee.

FITZGERALD, S.—In re Estate of Lane, Surr. Dec. 1891, p. 388, the question was whether the temporary administrator was entitled to receive compensation measured by the value of his services, which he claimed to be in excess of the commissions fixed by statute for the services of an executor or administrator. It was held that the statutory commissions furnished the stan-

dard to be applied in measuring his remuneration, but no determination was made that the court, in applying the standard, should confine it to cases in which an executor or administrator could be awarded commissions. The fact that an executor is not entitled to commissions on property specifically bequeathed is no reason for depriving a temporary administrator of commissions thereon. It is the duty of the executor to deliver the property to the legatee pursuant to the direction of the testator, and in such case it is considered that there cannot be, actually or constructively, such a receiving and paying out within the meaning of the statute, or such a rendition of services as would entitle him to commissions. The object of the law in providing for the appointment of a temporary administrator is to insure the safety and preservation of the property, and, ordinarily, its ultimate delivery in kind by the administrator upon the termination of his office, and the compensation which is awarded to him is given for these services. *Green v. Sanders*, 18 Hun, 308; *Estate of Maltby G. Lane*, Surr. Dec. 1891, p. 388; *Estate of Stanfield*, Surr. Dec. 1892, p. 237. The circumstance, therefore, that some of the bequests in this case are specific does not deprive the administrator of commissions on the same.

Decreed accordingly.

In the Matter of the Will of DANIEL HYLAND, Deceased.

(*Surrogate's Court, New York County, Filed February, 1894.*)

WILL—EXECUTION—PROOF OF.

Where one of the subscribing witnesses cannot be produced and no other persons were present at the execution of the will, testimony of the other witness, if his character is unimpeached, when supported by the apparent good faith of the transaction and a full attestation clause, is sufficient to prove that testator made his mark.

Application for the probate of a will.

Arthur Van Siclen, for proponent.

RANSOM, S.—The decedent signed his will by a mark. On the face of the paper it was properly attested by two subscribing witnesses, whose signatures follow the recitals in a full attestation clause. One of them, Metz, has since died. Lawler, the surviving witness, testifies to all the facts necessary to show the proper execution of the instrument. The provisions of the Revised Statutes and of the Code, in respect to the execution of wills, are substantially alike. 3 Rev. St. (6th ed.), p. 59, sec. 11; Code Civ. Pro. sec. 2620. The language of the Code is:

“If all the subscribing witnesses, or, if a subscribing witness is dead, . . . the will may nevertheless be established upon proof of the handwriting of the testator and of the subscribing witnesses, and also of such circumstances as would be sufficient to prove the will upon the trial of an action.”

The real question to be decided is whether the evidence of Lawler, the surviving witness, of the making of the mark by the decedent, without confirmatory testimony by others, is sufficient under the law, to admit the will. The subject has been considered by various surrogates in this State. In 1867, Surrogate TUCKER, of this county (*In re Walsh*, 1 Tuck. 132), held that a will subscribed by a mark could not be admitted if the second subscribing witness could not be produced. In 1870 the surrogate of Orange county criticised this conclusion, holding that Surrogate TUCKER might have overlooked an important particular of the section of the statute which provided for the proof “of such other circumstances as would be sufficient to prove such will on a trial at law;” and he held that, if others present at the time of the execution proved the making of the mark by the testator, it was sufficient to admit the will to probate. In *re Simpson's Will*, 2 Redf. 29. In 1886, in *re Reynolds' Will*, 4 Dem. 68. Surrogate COFFIN, of Westchester county, stated

that in such a case "it is indispensably requisite that the handwriting of the testator be proven, which can be done by some one sufficiently familiar with the cast or form of the writing of the person to enable him to identify it as his, but that a cross-mark has no such cast or form as to distinguish it from a like mark made by any other individual, and cannot be the subject of expert testimony; but the difficulty would doubtless be obviated were witnesses able to testify that they were also present, and saw the deceased make his mark." As there was no other than the surviving subscribing witness present to prove the fact, probate was refused. In 1887, in *Worden v. Van Gieson*, 6 Dem. 237, the surrogate of Monroe county denied probate of a will signed by a mark. It had a full attestation clause. Smith, the attorney who drew the paper, and was a subscribing witness, was dead. The other witness testified to Smith's signature, and said that, though the decedent told him the paper was her will, and how she made it, he did not see her sign it, nor did she tell him that she had signed it. In the absence of other testimony, the surrogate held that there was a failure of proof of either the signing or the acknowledgment of the mark. In *re Dockstader*, 6 Dem. 106, the surrogate of Montgomery county took a view radically different from those expressed in antecedent decisions, holding the testimony given by a living subscribing witness of the making of the mark by a testatrix was proof of her handwriting, and was sufficient. In 1889, in *re Phelps*, 5 N. Y. Supp. 270, led by the general current of previous decisions, I denied probate to the will. The decedent was a patient in a hospital in Philadelphia, and the two subscribing witnesses were Stewart, the hospital apothecary, who was the draughtsman of the paper, and Kennedy, a patient who died before it was offered for probate. The will had a full attestation clause. Stewart was examined under a commission, on interrogatories more or less formal in their character, and his testimony proved the proper execution of the instrument and the making of the mark by the decedent. Following the most liberal precedent decision

except in *re* Dockstader, *supra*, I held that, unless the testimony of other persons who were present at the time of the execution was given (and it was shown that there were others about at the time), probate must be denied. My decision may also have been influenced by the fact that the surviving witness was not examined in open court, and testimony given in response to formal interrogatories is seldom satisfactory to a trial court. But in 1891 I was led to, by a more thorough consideration of the question, change my view, and on the evidence of the living witness, without the testimony of others, I admitted the will of Ann Glass Neely to probate. Worden v. Van Gieson, *supra*, was reviewed in 1888 by the general term of the fifth department. Matter of Gieson, 47 Hun, 5. Judge Haight, in delivering the opinion of the court, said:

“It was therefore necessary, in order to establish this will, that the signature of the testatrix should be proved. This could be done by any person who saw her make her mark, or by her acknowledgment that she had so executed the will to each of the subscribing witnesses. As we have seen, the only evidence upon the subject is the fact of her publication of the instrument by declaring it to be her last will and testament. The question is, therefore, is this a compliance with the statute as an acknowledgment of her subscription to the will?” The court held that it was not, and on this ground affirmed the decision of the surrogate. But Judge Haight did not give any opinion as to the sufficiency of the evidence of the surviving subscribing witness if he had testified that all the requirements of the statute had been complied with, including the making of the mark by the testatrix, or the acknowledgment of it as her signature. Nor was the question considered whether the attestation clause could be accepted as evidence of execution, though in several cases it had been so decided by the Court of Appeals. Hence, we have no decisions in our State, except the few rendered by the trial judges, and in these we have seen the conclusions in some cases

are diametrically opposed, and in the others an intermediate ground is taken.

As the adjudications in other States, and even in the English courts, so far as I have been able to investigate them, do not furnish a parallel case, I deem it advisable to review the subject in the light of elementary principle, in the hope that my decision may afford a precedent that will be accepted until a higher tribunal shall find otherwise. What constitutes "handwriting," in the legal sense of the term, must be considered. It is defined to be the "cast or form of writing peculiar to each hand or person." If the decedent, in forming his signature, had made an effort to form the letters of any known alphabet, but had so far failed that no letter bore resemblance in form to the one it was intended to reproduce, and the aggregate could only be recognized as his signature by those who had seen him write, and were familiar with its general appearance, the testimony of the surviving witness, if it commended itself to the confidence of the court, even without an attestation clause to the instrument, would have been sufficient, with the proof of the other essential facts, to admit the paper to probate. But one who has never been taught to write cannot make letters. A person highly educated may, by physical disability, be too feeble to guide a pen. In such case the cast or form of his writing cannot be made manifest by the result of his effort. But the trend of the decisions show that the courts interpret the law in a spirit of liberality, that it may not defeat, but rather sustain, the wishes of testators, when the proofs show that the requirements of the statute in respect to execution have been substantially complied with, though in a literal sense they have not. Hence, that disability growing out of illiteracy or physical weakness shall not work the deprivation of the right of a person to execute an instrument, they have held that a mark or symbol, in whatever form, made by a testator, with or without aid, or if the physical act of making the mark was in fact wholly done by another, and he did nothing except to feebly touch the pen, or even if his name were

written by another at his request, and he made no mark, the result in either case is equivalent, and may stand in place of a subscription by the proper hand of the testator. *Jackson v. Jackson*, 39 N. Y. 153. I have said that no appellate court in this State has declared the value of the testimony of a surviving subscribing witness to the making of a mark by a testator, unconfirmed by the statements of others present at the execution of the will; nor have I been able, in the time I have had at my disposal, to find precedents in the adjudications in other States to meet the facts of this case. An English case decided in 1843—*In re Goods of Ashmore*, 3 Curt. Ecc. 757—was one in which the proof of the subscriptions of the two attesting witnesses by marks were considered. The testatrix was a woman of eighty-six years of age, who, after writing her codicil, took it into another room to two servants, Anne Cole and Elizabeth Sharpe, both of whom were illiterate, and requested them to make their marks to the paper, and each did as requested in her presence. The testatrix then wrote their names opposite the marks. By mistake she wrote the wrong surname of one of the witnesses,—Elizabeth Cummins instead of Elizabeth Sharpe. No other persons were present at the execution to prove the making of the marks by the witnesses, nor does it appear that there was anything in the character of the marks to enable the witnesses to identify them as those they had made, though the learned judge says, in his brief published decision, that they recognized their marks. Nor was it shown that there was an attestation clause to aid probate by its recitals, and it is more than probable that the judge in admitting the will was moved by the fact that the codicil was in the handwriting of the testatrix; that it bore upon its face the evidences of genuineness; that it was apparently executed in good faith; and that the witnesses, whether they were really able to identify their marks or not, did recollect having made them as signatures to a paper of a testamentary nature. But, under the decisions in this State, an attestation clause is one of the “circumstances” which, with “proof of the handwrit-

ing of the testator and of the subscribing witness," "would be sufficient to prove the will upon the trial of an action," and comes in aid of probate in cases of defective memory of witnesses, caused by the lapse of time from the date of the instrument to the examination of the witnesses, when there is an absence of evidence contradicting its recitals. *Brown v. Clark*, 77 N. Y. 369; *In re Pepoon*, 91 id. 255. Nor does the value of such a clause as a factor to establish the execution of wills end with cases of the non-recollection of witnesses of the performance of the acts necessary thereto. *In re Cottrell*, 95 N. Y. 329, decided in 1884, was the case of a will to which there was no attestation clause in due form, signed by a man and wife with whom the testator had boarded. Both witnesses testified that none of the formalities required by law were complied with in their presence, and they denied that either was present at the execution or signed the attestation clause. Yet the will was sustained, it being shown that both the will and the signature at its end were in the handwriting of the testator; that during his sickness he had said that his will, which he had described as executed with the two witnesses as present, was either among his papers or in the hands of his executor, and was in fact found among his papers. Though the will was in his own handwriting, it was proven that it had been more or less copied from a previous will. It was also shown to the satisfaction of the court, by the opinions of experts who had made a comparison of the signatures of the witnesses to the attestation clause with others admitted to be theirs, that they were identical. The decision of the surrogate admitting the will to probate was sustained. In *re Cottrell*, the court say also:

"It was always considered to afford a strong presumption of compliance with the requirements of the statute in relation to the execution of wills that they had been conducted under the supervision of experienced persons familiar, not only with the forms required by law, but also with the importance of a strict adherence thereto."

Applying these principles to the matter under consideration, I hold that the testimony of Lawler, with nothing to throw discredit upon his statement that he saw the decedent make his mark, is sufficient evidence of the fact, when considered in connection with all the circumstances attending the transaction. The written portions of the paper are in the handwriting of Metz, the deceased subscribing witness, who was a lawyer. It is intelligently drawn, is couched in the language of the law appropriate to such documents, and has a full attestation clause. An entry in the cash book of Metz shows money received for services in the matter about the time of the execution. Lawler, the living witness, testifies that the testator declared the paper to be his will, that he requested each of the subscribing witnesses to attest the execution by their signatures, and that each did so; and the signature of Metz is proved by the evidence of two persons. The will is a natural one. There is nothing suspicious on its face. All the circumstances attending its original execution, as set forth in the testimony, point to the good faith and genuineness of the whole transaction. I am satisfied that no question would have been raised in respect to the sufficiency of the proof of the execution, but for the decision in *re Walsh*, *supra*, which seems, except in one instance, in *re Döckstader*, *supra*, to have more or less influenced the decisions of other surrogates, myself included in one instance, though Surrogate Tucker's view has no support in the adjudications of the courts of this or other States, so far as I have been able to discover. While it is desirable to have the testimony of both witnesses to prove the making of a mark by a testator, yet, when one cannot be produced, and no other persons were present, the testimony of the other, if his character is unimpeached, when supported by the apparent good faith of the transaction and a full attestation clause, I hold to be sufficient. The will may be admitted.

Ordered accordingly.

In the Matter of the Compulsory Accounting of OSCAR WARING
et al., as Executors.

(*Surrogate's Court, Westchester County, Filed March, 1894.*)

EXECUTION.

An execution to enforce a surrogate's decree directing the payment of a sum of money by an executor should run against the property of the executor, and not against that of the estate.

A decree was made in this proceeding directing the executors to pay to Ann M. Paddock and Phebe B. Rockwell, each, the sum of \$6,082.55. A transcript of the decree was filed, and the decree duly docketed in the county clerk's office, and thereupon executions were issued, which, among other things, directed the sheriff to make such sum, in each case, out of the goods, etc., of Jarvis A. Waring, deceased, and if sufficient could not be found, then out of the real property of the deceased. The sheriff seized some securities left by the testator. A motion is now made to set aside the executions.

F. X. Donoghue, for motion; James M. Hunt, opposed.

COFFIN, S.—The executions are clearly void, and should be set aside. They should have run against the property of Oscar Waring and Wilbur F. Washburn, and not against the property of the estate. Section 2554 of the Code permits execution to be issued against the property of the party directed to make the payment. The next section authorizes, in a proper case, the surrogate to punish the party for contempt for not making the payment as decreed. That, of course, would be a proceeding against his own person. In *Peyser v. Wendt*, 2 Dem. 221, the surrogate of New York took the view that the execution was properly issued against the property of the executor and cited authorities on the subject. The Court of Appeals has held the same in

Power v. Speckman, 126 N. Y. 354-359. See form of execution in Redf. Pr. (5th ed.) 1009, substituting, however, the letters "Y. Z." for "A. B." in last clause.

The executions must, therefore, be set aside, and all proceedings under them consequently fall.

Motion granted.

Note.—An execution to enforce a decree directing payment by an executor as such must run against his property. (*Matter of Quackenbos*, 38 Misc. 66.)

In the Matter of the Judicial Settlement of the Accounts of
AUSTIN D. EWEN, as Sole Surviving Executor of
GEORGE RICARD, Deceased.

(*Surrogate's Court, Kings County, Filed March, 1894.*)

SUSPENSION OF ALIENATION.

A will bequeathed the income of a specified sum to three persons, the principal of the share of either on his or her death to go to his or her children, if any; if none, the income of such share to go to the survivor or survivors, and the principal to the children who survived all three. *Held*, that as to the share of the one first dying the bequest was void as suspending the absolute ownership for three lives; but that as to the shares of the other two it was valid.

Judicial settlement of accounts of executor.

W. T. Graff, for executor; T. Henry Dewey, for Edward F. Randolph et al.; William J. Carr and Edward M. Bassett, for special guardians.

ABBOTT, S.—George Ricard died on the 7th day of January, 1881. He left a last will and testament which was admitted to probate on the 9th day of February, 1881.

By his last will and testament he made provision for various nephews and nieces, of which he left a large number surviving him. Among the provisions of his will were the following:

"Fourth. I give and bequeath unto Mary Catherine Johnson, Edward F. Randolph and Elizabeth Boose, children of my sister, Mary Agnes Van Name, the annual income or profit of and upon the sum of three thousand dollars each. On the death of either leaving a child or children, then the sum of three thousand dollars shall go to such child or children. On the death of either leaving no child or children, then the income or profit shall go to the survivor or survivors, and the principal shall be reserved to the child or children that may survive all three. If all three die leaving no child or children, then the principal shall be converted back into and remain with my estate.

"Twelfth. I give and bequeath unto my four nieces and two nephews, to wit, Maria Theresa Berrian, Mary Agnes Allen, Abby Louisa Ewen, Elizabeth Matilda Lamoreaux, George Ricard Connor, and John Ricard Connor, the net income of all my estate, both real and personal, excepting, however, and subject to such as is herein otherwise given and bequeathed, to be divided equally between them, share and share alike, for and during their natural lives. My executors hereinafter named shall take charge and control of my said estate, collect and receive the rents, income and profits thereof, pay all taxes, assessments and expenses, and divide the net proceeds, the one equal sixth part thereof to and for each of my aforementioned nieces and nephews, to wit, Maria Theresa Berrian, Mary Agnes Allen, Abby Louise Ewen, Elizabeth Matilda Lamoreaux, George Ricard Connor, and John Ricard Connor, share and share alike, the same to be paid annually, or as much oftener as my said executors may deem proper.

"Thirteenth. In case of the death of either of my said four nieces, then I give, devise and bequeath the one equal sixth part of all my said estate, real and personal, to the children of such

niece who may survive her, and to the heirs of such of her children as may have died before her.

"Fourteenth. In case of the death of either of my said two nephews leaving a widow, the mother of his child or children, then the one equal sixth part of such net income theretofore paid to him shall thereafter be paid to such widow for and during her natural life, provided, however, that in the event of her remarrying, thence and from thenceforth such life estate and income shall cease.

"Fifteenth. On the death of either of my said two nephews leaving no widow, the mother of his child or children (or leaving such widow, then on her death or remarrying), then I give, devise and bequeath the one equal sixth part of all my said estate, real and personal, to the children of such nephew who may survive him, and to the heirs of such of his children as may have died before him.

"Sixteenth. For the purpose of carrying out the provisions of this will and making an equal division as aforesaid, my executors are hereby authorized and empowered to sell my said real estate or any part thereof, and also my personal estate or any part thereof, whenever in their opinion the same may be necessary and proper."

The above-quoted clauses are the only ones which require construction in this proceeding.

The clauses of the will numbered twelfth, thirteenth, fourteenth, fifteenth and sixteenth, constitute substantially a single clause, and are to be construed together. Taken by themselves, they present no difficulty in their interpretation.

The effect of the dispositions contained in these clauses is: (1) To exclude all property previously attempted to be disposed of. (2) To divide the property into six equal parts. (3) To pay the income of one such equal share to each of the nephews and nieces named for life. As to the shares of the nephews, to pay the income to their respective surviving widows, if any, mothers of their children. (4) To pay the capital of their respec-

tive shares to the children and descendants of the nephews and nieces respectively per stirpes. (5) If no children survive the nephew or niece or widow of a nephew, then as to the capital of such one-sixth share set apart for the benefit of such nephew or niece, no disposition has been made by the testator, and the same passes to the next of kin and heirs at law of the testator.

The "fourth" clause of testator's will above quoted bears no particular relation to the other portions of the will, and may be interpreted as though the property disposed of by it constituted the entire estate of the testator.

It is true that as to each sum of \$3,000 upon a certain contingency contained in this clause, namely, the death of Mary, Edward or Elizabeth, leaving no child or children, the disposition has the effect to suspend the absolute ownership of at least one of the funds beyond two lives in being.

The rule of construction of such testamentary dispositions as that above quoted was apparently well settled in this State by the case of *Knox v. Jones*, 47 N. Y. 389, and cases cited at page 397.

The testator in that case, Alfred G. Jones, bequeathed his residuary estate in trust to collect the whole income and pay the same: (1) To testator's brother, William B. Jones, during his life. (2) On the death of said brother said income shall be divided equally among testator's sisters, Catharine and Georgiana. (3) On the death of either Catharine or Georgianna to the survivor of them for life. (4) On the death of both, the entire principal was bequeathed to the children of Georgiana. (5) If no child of Georgiana survived Catharine and Georgiana, the entire principal was bequeathed to Columbia College. Held, that the bequest was void. Judge Allen says at page 397: "It is true that it is possible that, by the death of one or both of the sisters during the life of the brother, the absolute ownership may not actually be suspended beyond the time allowed by the law, but this possibility will not sustain the will. If the suspension of absolute ownership will not, under all circumstances, that is,

necessarily, terminate within the prescribed period, the disposition is void."

In this case it was clearly the intention of the testator that the title to the whole fund should vest in the trustee, and that under no circumstances should the absolute ownership of any part of the fund vest in any person until after the termination of the three lives of Wm. B., Catharine and Georgiana.

The general rule above stated has always been and is now recognized as the proper rule of interpretation, with a slight qualifications under the later decisions.

In *Purdy v. Hayt*, 92 N. Y. 446, the subject-matter involved was real property, and much of the authority of that case has no bearing whatever upon the subject now under consideration.

It did, however, contain a construction of the statute against perpetuities upon facts as to real property not unlike those now involved as to personal property.

"Delevan died in 1864, leaving a will by which he gave his real estate, consisting of a farm at Fishkill, to his sisters, Jane and Catherine, 'during their respective lives,' and after their death he directed it to be sold by his executors, the proceeds to be invested and the income to be paid by them to his niece, Elizabeth Brinkerhoff, daughter of his sister Betsey, 'during her life, and at her death the principal to be divided equally between any children she may leave, or if but one such child, the whole to be paid to that one.' But should said 'niece, Elizabeth, die not leaving lawful issue,' then the principal was given to other parties named in the will.

"The two sisters of the testator, Jane and Catherine, survived him. His sister Jane died in 1865, and his sister Catherine in 1867. His niece, Elizabeth Brinkerhoff, also survived him" and his two sisters.

Judge ANDREWS says at page 457: "The rule is well settled that where by the terms of the instrument creating an estate there may be an unlawful suspension of the power of alienation the limitation is void, although it turns out by a subsequent

event, as by the falling in of a life, no actual suspension beyond the prescribed period would take place. *Hawley v. James*, 16 Wend. 121. But this rule relates to cases where, if the limitations take effect in their order, as contemplated by the grantor or deviser, some of the estates limited will not vest within the prescribed period, and they are cut off as too remote, although it may happen that the estates so cut off would, by events subsequently happening, take effect within two lives."

In the *Purdy* case testator's sisters, Jane and Catherine, took a life estate in the property as tenants in common, each being seized of the one equal one half. Therefore, it was certain that as to one half interest in that property there could not be a suspension beyond two lives; that is, the life of the survivor of Jane and Catherine and the life of Elizabeth, although it could not be determined at testator's death which sister's life, that of Jane or Catherine, it should be.

I have entered thus fully into the discussion of these two authorities because they contain the rule under which the provision of the "fourth" clause of the will of George Ricard must be interpreted.

Under this clause three separate funds of \$3,000 each are established for the benefit of testator's nephews and two nieces, Edward, Mary and Elizabeth, respectively. In case either dies, leaving a child or children, the capital of his or her fund goes to such child or children. I am clear that whatever conclusion may be reached as to the provision over, upon the contingency of the death of either Edward, Mary or Elizabeth without child or children, in the event of the decease of either leaving a child or children the trust is valid and is separable from the further contingency which creates the doubt in which the construction of this clause is involved. *Knox v. Jones*, 47 N. Y. 389-398; *Tiers v. Tiers*, 98 id. 568-573.

In the latter case Judge RAPALLO says at page 573: "But whatever construction be adopted in this respect, it is very evident that the ulterior contingent limitation is quite separable from

the primary trust, and merely incidental, its only purpose being to provide for a contingency which may never arise, and the failure of that provision would not affect the general scheme of the testatrix."

So in our case it was the primary intention of the testator to provide in the "fourth" clause of the will for Mary Catherine Johnson, Edward F. Randolph and Elizabeth Boose during their lives, and upon their deaths, respectively, that the capital of the fund should go to their children. This part of the provision is easily and properly separable from the contingency provided for in the event of their decease without leaving a child or children, and so far, at least, stands under the above authority. See, also, *Underwood v. Curtis*, 127 N. Y. 523, 541.

Now, as to the gift over upon the contingency of the death of either Mary, Edward or Elizabeth, leaving no child or children. This has actually occurred in the case of Mary.

Upon testator's death, as in the *Purdy* case, 92 N. Y. 446, it was certain as to two of the funds of \$3,000 each that under any circumstances there could not be any suspension of absolute ownership beyond two lives in being, although it could not be determined at that time which two of the three funds it should be.

This uncertainty has now been removed by the death of Mary.

As to her share the disposition over upon the contingency of her death leaving no child or children, which has happened, is void, because the absolute ownership of the fund was sought to be suspended by this testator for three lives in being at the time of his decease; the lives of Mary, Edward and Elizabeth.

As to the shares of Edward and Elizabeth, speaking from the date of testator's death, the absolute ownership of either fund cannot be suspended for more than the two lives of Edward and Elizabeth.

I have reached this conclusion solely upon the authority of the *Purdy* case, 92 N. Y. 446. I have been unable to perceive any difference in principle upon the facts here involved and those

upon which the construction was made in that case, although I should have been equally unable to so distinguish earlier decisions upon the same subject as to justify the conclusions which I have reached.

Having reached the conclusion that the bequest in favor of Mary is void after her decease, it remains to be determined what shall become of the fund bequeathed for her benefit.

I am of the opinion that it is undisposed of by the will and must be distributed to the next of kin of the testator.

It seems clear that the testator did not intend to include either of these sums in the dispositions of the twelfth, thirteenth, fourteenth, fifteenth and sixteenth clauses of his will under any circumstances. The effect of so doing must necessarily be to still further suspend the absolute ownership of the fund, and to certainly render void another and portions of the third legacy contained in the "fourth" clause. Such an intention will not be presumed.

Let decree enter accordingly.

In the Matter of the Application to Revoke Letters of Administration, with the Will Annexed, Issued to
T. CHESLEY RICHARDSON et al.

(Surrogate's Court, Westchester County, Filed April, 1894.)

1. EXECUTORS—REMOVAL—RESIGNATION.

One who has acted as an executor without having qualified or received letters testamentary cannot be removed or resign, as he is not a legal executor.

2. SAME—CITATION.

Where a residuary legatee applies for letters of administration, he need not cite anyone.

The testator died in 1865, and his will was proved in this county the same year, disposing of a large estate. By the will

he provided that the executors or administrators of the survivor of two executors and trustees appointed by him should have the power to appoint an executor and trustee in their place. His wife, the survivor of the two named in his will, died in January, 1890, leaving a will, by which she nominated her son, T. Chesley Richardson, and John Mulligan executors thereof, and they appointed said T. Chesley Richardson executor and trustee of Thomas Richardson's will. Thereupon, on their petition and that of Anna P. R. Kirkland, a daughter of Thomas Richardson, deceased, an order was entered appointing said T. Chesley Richardson such executor and trustee. Subsequently an accounting was had as to his proceedings, wherein it was found that some irregularities had been committed by him in the use of the funds of the estate, but no loss resulted to the estate. Other accountings followed, until at length Mrs. Kirkland applied to have him removed as executor and trustee. He then applied for leave to resign, rendered his account, and on December 20, 1893, an order was entered removing him, and permitting him to resign on complying with the provisions of the decree, and delivering to the New York Life Insurance & Trust Company, his successor as trustee, all the securities and money then in his hands, with which he complied. On the 5th day of January, 1894, he being a residuary legatee under the original will, obtained letters of administration with the will annexed, in which James H. Moran was duly joined with him, they giving the usual bonds. Now Mrs. Kirkland has made an application to have these letters revoked, mainly on grounds of misconduct disclosed on his first accounting.

Clarke & Culver, for motion; F. X. Donohue and S. E. Duffey, opposed.

COFFIN, S.—It is a curious fact and a matter of considerable moment in this case that T. Chesley Richardson never became a legally constituted executor of the will of Thomas Richardson,

deceased, but has been regarded and treated as such. An order was made sanctioning his appointment by the executors of his mother's will, but he never qualified or received letters as such. He could not legally act as executor any more than if he had been named executor in his father's will and failed to qualify. He was simply executor *de son tort*, and subject to all the consequences flowing from that relation.

Section 2594 of the Code provides that before letters testamentary shall be issued to a person named as executor, he shall take the oath of office as therein prescribed. As has been already stated, this has not been done, nor letters issued. Thus, the liability of Mr. Richardson should have been sought to be established under sec. 2706, not inserted in the Code until 1893, but which is as old as the Revised Laws of 1813. See, also, 2 R. S. 81, sec. 60; Id. 449, sec. 17. It also appears by the findings of fact and conclusions of law made in the first accounting, dated July 7, 1893, prepared by Mrs. Kirkland's counsel, that the trust under the will was acknowledged by her to have been terminated in so far as she was concerned, and yet she subsequently applied to this court to have him removed in both capacities. It is quite plain that not only on that accounting, but in all subsequent proceedings, no jurisdiction was obtained or existed to deal with him as an executor, and the trust, according to the findings, having been executed as to her, there was no sufficient basis for any action, in that respect, on her part. Nevertheless, all decrees and directions of this court, however futile, have been complied with by the so-called executor and trustee, and the estate has suffered no loss or injury by any act of his. All the material facts stated as grounds for the revocation of his present letters of administration, with the will annexed, were furnished by the testimony of himself on his first accounting, and, if we are allowed to regard them here, disclose no intended wrong, but rather a misconception of the rights, duties and powers of an executor. They alone would not seem to justify a revocation of letters testamentary had they ever been issued to him.

The singular order for the removal and acceptance of the resignation of Richardson, as executor, when he was not such, was entered by consent and was a nullity. No court could remove a person from an office he had never held, nor revoke letters which had never been issued, nor accept a resignation from such office. And as to his removal as trustee, it had been conceded by the petitioner here that the trust had been executed, and there was, therefore, and could be no cause for his removal. He could not be removed from an office which he had fully executed, nor resign from one he had never held, as above stated.

I have examined the cases of Suarez, 3 Dem. 164; Matter of Dearing, 4 id. 81; Matter of Beakes, 5 id. 128, cited by the learned counsel for petitioner, and find that all of them relate to cases where the executors had qualified. Doubtless none similar to this can be found. Here a resigned office has not been allowed to be resumed.

It is alleged that the letters of administration were obtained by a false suggestion of a material fact, to wit, that the petitioner concealed the fact that he had acted as executor and trustee and been removed and had resigned. There seems to be no force in this allegation under the circumstances already stated. The petition was in the ordinary and usual form, and there was no occasion to make such a statement had it been true.

Another objection is that Mrs. Kirkland had no notice of the application for the letters. He was a residuary legatee, and where such a person applies he is bound, under sec. 2644 of the Code, to cite no one. It is only where a person having a subordinate right petitions that he must cite those having a prior one, and residuary legatees have the first right.

Letters of administration with the will annexed having been duly issued to Richardson, with Moran joined with him, and they having given satisfactory bonds with proper sureties, no sufficient reason is discovered, under all the remarkable and somewhat complex circumstances, for their revocation.

Application denied, with costs.

In the Matter of the Collateral Inheritance Tax on the Estate
of LOUISA S. PLATT, Deceased.

(Surrogate's Court, Westchester County, Filed April, 1894.)

COLLATERAL INHERITANCE TAX—PENALTY.

The mere fact that the executors were ignorant of the law and that payment of the penalty for non-payment of the tax would be a hardship on the estate is not a ground for relieving them from such penalty.

Henry W. Bibby, one of the executors, etc., of the deceased, presents a petition, in which it appears that the testatrix died on the 20th day of February, 1889; that by her will she bequeathed the use of the residuum of her estate to her niece, Augusta Bibby, during her life, and upon her death, leaving her daughter, Mary Bibby, surviving, then the like use for life to said Mary, and at her death the fund was bequeathed to others; that the executors rendered their account and a decree was entered on the 6th day of February, 1891, fixing such residuum at \$31,261.91; that the executors were ignorant of the law relating to the tax; that in 1894 a decree was made fixing the tax upon the estate of Augusta Bibby at \$691.25, and on that of Mary Bibby at \$517.50; that thereupon the amount of the taxes, so fixed, was tendered to the County Treasurer, which was refused unless a penalty of ten per cent., amounting to more than \$600, was paid thereon; that the executors have no funds, other than said residuum, out of which to pay said taxes and penalties, and that Augusta Bibby is sixty years of age, without other property, and is wholly dependent for her support upon the slender income from said trust fund, which is barely sufficient for the purpose, and prays for an order relieving the estate from the payment of any penalty.

Strong & Cadwalader, for motion; John Hoag, County Treasurer, in person, opposed.

COFFIN, S.—By section 15 of the Act of 1887 it is provided that the Surrogate's Court of the proper county shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of that act. Here, such a question having arisen, it is proper for this court to determine it, the County Treasurer having no judicial power on the subject. His duty is doubtless to demand the penalty of ten per cent. in this case, and it is a fair question as to whether or not the liability exists. It might be that facts could be shown which, under the provisions of section 5, would relieve the estate from liability for the penalty. These facts should be adjudicated, where the question arises, by the court.

However much hardship to persons may spring from the exaction of the penalty in this or any other case, yet the provisions of the statute must be enforced. No reason is furnished here other than such hardship resulting from ignorance of the law. It is an old legal maxim that *ignorantia legis neminem excusat*. The application, therefore, is denied.

In the Matter of the Estate of ROBERT NEWLAND, Deceased.

(*Surrogate's Court, Chautauqua County, Filed April, 1894.*)

EXECUTORS—COMMISSIONS.

Where the estate exceeds \$100,000 over all debts and one of two executors dies before full administration, the estate of the deceased executor is entitled, on final settlement, to a full commission on all property paid out or distributed at the time of his death and a half commission on all property distributed thereafter, and the surviving executor to a full commission and a half commission on the property distributed after his co-executor's death.

Application to determine commissions upon final accounting.

Frank W. Stevens, for Fred. A. Bentley, surviving executor, and Evelyn N. Post, sole legatee; Jerome B. Fisher, for Frank E. Gifford, executor of the estate of John J. Kinney, deceased, and his daughter, Margorie Kinney, minor legatee under his will, and M. M. Skiff, her general guardian.

SHERMAN, S.—The personal estate of the testator exceeded in value more than \$100,000 over all his debts. By his will he appointed Fred. A. Bentley and John J. Kinney, Esq., executors thereof, both of whom qualified upon probate of the will on October 8, 1891, and continued to act together in administering the estate up to the death of said Kinney on February 19, 1893, since which time the surviving executor has acted alone in administering the estate. The executors during one year and four months prior to the death of Kinney had collected, paid out and distributed to legatees and others a considerable portion of the estate of the testator, and then had in their hands, undistributed, money and securities of said estate of the amount and value of over \$30,000. The learned counsel of the surviving executor strongly claimed, upon the argument and by his brief, that only one full commission should be allowed upon this settlement, and that to the surviving executor, and none to the estate of the deceased executor.

I hold and decide that the surviving executor is entitled to receive as compensation for his commissions upon final settlement and distribution of this estate the same that by law he would have been entitled to if he had been sole executor, and in addition thereto one-half of the commissions, allowed by law, upon all the property of the estate on hand and undistributed at the death of his co-executor, John J. Kinney, on February 19, 1893.

And I hold and decide that the executor of the estate of said Kinney, represented in this proceeding, is entitled to full compensation for commissions, allowed by law, upon all the property of the estate of the said Robert Newland actually received, paid

out, and distributed to legatees and others by both of said executors up to the time of the death of said Kinney, on February 19, 1893, and that the estate of said Kinney is also entitled to one-half the commissions allowed by law upon all the property of the estate of said Newland held by both executors and then remaining on February 19, 1893, undistributed, the same being in this case one-half of one per cent. ; thus allowing, in all, two full commissions upon all the property, real and personal, of the decedent, Robert Newland, authorized to be sold and distributed under his will. Section 2736, Code Civ. Pro., as amended by chap. 686, Laws of 1893; *Welling v. Welling*, 3 Dem. 511; *Matter of Garrison*, N. Y. Law Journal, July 28, 1890; *Matter of Kennedy*, N. Y. Law Journal, June 13, 1891; *Redf. Sur. Pr.*, 5th ed., note 2, 813; *Smith v. Buchanan*, 5 Dem. 169, holding that the proceeds of sale of real property made by the executors under the will are to be reckoned as part of the personal estate for the purpose of allowing commissions under section 2736 of the Code of Civ. Pro.; *Matter of Kenworthy*, 44 St. Rep. 275, holding that where the estate exceeds \$100,000 personal property, over all debts of the decedent, and there are but three executors, each is entitled to full commissions based upon the whole estate, irrespective of which executor actually handled it. The above authorities appear to be in line with justice to the rights of all parties interested.

I direct decree accordingly, upon the final judicial settlement and distribution of this estate, and that ten days' notice for the hearing and adjustment before the surrogate as to values and amount of commissions be given to all parties interested.

Decreed accordingly.

In the Matter of the Estate of JOHN F. KENE, Deceased.

(*Surrogate's Court, Westchester County, Filed April, 1894.*)

1. DEVISEES.

One to whom land subject to a mortgage is devised must pay such mortgage from his own property, without resort to the executor, unless the will provides otherwise.

2. INHERITANCE TAX—EQUITY IN LAND.

Where the equity in land devised is less than \$500, it is exempt from the collateral inheritance tax.

The deceased died on the 11th day of May, 1891, leaving a last will and testament. His estate consisted of real and personal property, all of which, with the exception of one house and lot, he bequeathed and devised to his two brothers, and was not of sufficient value to cause it to be subjected to taxation under the Collateral Inheritance Tax Law then in force. The house and lot mentioned was devised to one Louisa F. Hoffkens, who was not related to the testator. An appraiser was appointed to ascertain and fix the value thereof, who duly reported such value at \$1,509.43. A tax amounting to seventy-five dollars and forty-seven cents was assessed and fixed thereon accordingly. An appeal was taken therefrom to the surrogate, the ground thereof being that there was a mortgage on said property of the amount of \$1,100 at the time of the death of the decedent. The personal estate bequeathed to the brothers was of the value of \$4,000.

C. E. Kene, for appellant; Edward Hassett, for respondent, the County Treasurer.

COFFIN, S.—It is claimed by the counsel for the respondent that the bond accompanying the mortgage was an obligation of the deceased which his executors should pay, they having sufficient funds of the estate for that purpose. If this view were

correct the mortgage would be satisfied out of the personal estate, and the devisee of the house and lot would take it free therefrom, and so be liable to the payment of the tax. In this he seems to be in error. Such was the rule in England, but it was changed in this State as early as 1786, and is continued to the present day. By sec. 4, page 749, of the 1st Revised Statutes now in force, it is provided that "whenever any real estate, subject to a mortgage executed by an ancestor or testator, shall descend to an heir or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property, without resorting to the executor or administrator of his ancestor, unless there be express direction in the will of such testator that such mortgage be otherwise paid." See revisers' note to the section. The will gave no direction for the payment of the mortgage.

The word "ancestor," in *Termes De La Ley*, is said, in a forensic sense, to be more properly applied to the possessor of an estate than to an ancestor of a family, and in this sense it is frequently, and, indeed, most generally, employed in books which treat of descents of real estate and in statutes relating to that subject. Burrill, in his *Law Dictionary*, defined it to be "one who has gone before or preceded in the seizin or possession of real estate." Here the devisee takes it *cum onere*. *Taylor v. Wendel*, 4 Barb. 324; 4 Kent's Comm. 420. In a proceeding in Surrogates' Courts to sell real estate for the payment of the debts of a decedent, on which there is a mortgage, the bond which usually accompanies it is never treated as a debt to be proven.

As the value of the equity in the premises is found to be less than \$500, it is exempt from taxation, and the decree fixing the tax is, therefore, reversed, with costs.

Decree reversed, with costs.

In the Matter of the Collateral Inheritance Tax on the Estate
of MARIA LOUISE STERLING, Deceased.

(*Surrogate's Court, Orange County, Filed April, 1894.*)

1. INHERITANCE TAX.

The law in force at the death of the decedent governs as to the rights accrued and liabilities incurred.

2. SAME.

Under the Collateral Inheritance Tax Law as it existed prior to the act of 1892, the \$500 limitation referred to the interest of the legatee or distributee, and not to the estate of the decedent.

Proceedings to assess tax upon property passing under the will of Maria Louise Sterling, deceased.

E. E. Roosa, for executors; D. W. Esmond, for Calvary Presbyterian Church, of the City of Newburgh, N. Y.; Louis Bedell, for Comptroller and County Treasurer.

McELROY, Sp. S.—The testatrix died on the 2nd day of January, 1892. It appears that on account of the claims of certain persons it became necessary to bring an action for the construction of one or more clauses in the will of deceased; and that owing to the death of some of the defendants after the action was commenced, and for other good and sufficient reasons, a decree construing the clauses in said will was not handed down until the month of January, 1894, and that immediately thereafter these proceedings were commenced.

The report of the appraiser was filed April 12, 1894. By said report the gross estate of testatrix was valued at \$13,000, and the value of the legacies or distributive shares under the will appraised as follows: To Margaret Carter, sister-in-law of testatrix, \$3,000; to Isabella Chatterton, sister-in-law of testatrix, \$2,000; to Katie Withers, who is not related to testatrix, \$5,000; to Olive B. Withers, who is not related to testatrix, \$200; to Calvary Presbyterian Church of Newburgh, N. Y.,

\$500; to twenty-four relatives of testatrix (nephews and nieces) each \$78.84; to Maria Louise Socks, stepniece of testatrix, \$157.68.

The first question presented is whether this proceeding to determine the amount of tax the above estates are liable for shall be in accordance with the laws in force at the death of testatrix, or those in force at the time this proceeding was actually instituted.

The act of June 10, 1885, entitled "An act to tax gifts, legacies and collateral inheritances in certain cases," together with the act of 1887 (which, to some extent, superseded the act of 1885), and the acts amendatory thereof, including the act of 1891, were repealed in 1892, and a new act passed, which re-adopted the general scheme of the original statute, and also imposed a tax, within certain limits, upon direct as well as collateral inheritances, which act is known as "The Transfer Tax," and went into effect May 1, 1892. Chap. 399, Laws of 1892. This act provides that, so far as its provisions are substantially the same as those of laws existing on April 30, 1892, "they shall be construed as a continuation of such laws, modified or amended according to the language employed in this act, and not as new enactments."

Section 24 of the act is in part as follows: Saving clause. "The repeal of a law, or any part of it, specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to May 1st, 1892, . . . but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such a law had not been repealed . . ."

The right of the State to the tax accrued at the date of the death of testatrix, January 2, 1892 (Matter of Prime, 45 St. Rep. 832), and although these proceedings were not commenced until January, 1894, yet the law in force at the date of the death of testatrix must govern as to the rights accrued and the

liabilities incurred. Matter of Miller, 19 St. Rep. 246; Matter of Richardson, N. Y. L. J. 1893.

The counsel for the Comptroller also claims that the legacies or distributive shares to the nephews and nieces and the step-niece of testatrix, and the legacy to Olive B. Withers of \$200, who is not related to testatrix, are taxable.

In view of the fact that the order fixing the tax in this proceeding must be made in accordance with the law in force at the death of testatrix, it is necessary to consider the meaning of the clause: "Provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to said tax or duty." This clause appears in sec. 1 of the act of 1885, and is retained in each amendment of that section of said act, including the act of 1891.

If the word "estate" means the estate of the testatrix, and not the estate or property given to the persons liable to taxation, then the contention of the counsel for the Comptroller may be correct.

It seems to me, however, that the legislature, at least prior to the act of 1892, intended the words "An estate valued," as used in said proviso, to mean the estate or property or interest of the legatee, or person entitled to a distributive share, and not the value of the estate of the decedent, and that the estate or property passing to persons not exempt by said act was not subject to a tax, unless such an estate was, independent of the estate of the decedent, of the value of \$500 or more.

If the legislature had intended the \$500 limitation to mean the estate of the decedent, the act would doubtless have directed the tax to be levied upon so much of the estate of a decedent of the value of \$500 or more as was bequeathed or to be distributed among those not exempt by the act, and the duty of the court then would have been to first assess the tax upon the whole estate so bequeathed, or to be distributed, if it was of the value of \$500 or more; and, second, determine the proportionate part of the

tax thus levied which each legacy or distributive share, not exempt as aforesaid, should pay.

Under the act of 1892 it has been held (*Matter of Flynn*, N. Y. L. J., Feb. 25, 1893), that, as the property passing to those not exempt was over \$1,800 in value, each of four legacies of \$100 each to strangers were subject to the tax.

The act of 1892 does not contain the proviso above quoted, and the language of the act differs from the act of 1885, as amended, including the amendment of 1891.

By the act of 1892 "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, . . . to persons or corporations not exempt, . . . " meaning the property of the testator, and not the property passing to the individual legatees or distributees, and if this proceeding was under the act of 1892, the legacies or distributive shares to the twenty-four nephews and nieces, and to the step-niece of testatrix, and the legacy to Olive B. Withers of \$200, would, doubtless, be liable to the tax, for the estate of testatrix, thus disposed of, amounts to over \$2,200.

I am, therefore, of the opinion: First. That these proceedings are to be determined in accordance with the Collateral Inheritance Tax Laws in force at the death of testatrix, January 2, 1892. Second. That the legacy to Margaret Carter of \$3,000, and to Isabella Chatterton of \$2,000, each a sister-in-law of testatrix, are each subject to tax of five per cent. That the legacy of \$5,000 to Katie Withers, who is not related to testatrix, is subject to a tax of five per cent. Third. That in view of the law prior to the act of 1892, the burden of this tax does not rest upon the value of the estate of the deceased bequeathed or distributed to those not exempt, but upon each beneficiary; and that inasmuch as the legacies or distributive shares to the twenty-four nephews and nieces, the share to the step-niece, Maria Louise Socks, and the legacy to Olive B. Withers, who is not related to testatrix, are not individually and severally of the value of \$500, they are not taxable. *Matter of*

Smith, 5 St. Rep. 380; Matter of McCready, 10 id. 696; Matter of Hopkins, 19 id. 516. Fourth. That the legacy of \$500 to the Calvary Presbyterian Church, an organization incorporated under the laws of this State, a religious corporation, is not taxable, the same being exempted under chapter 553, Laws of 1890. Fifth. That the penalty of ten per cent. per annum, imposed by sec. 4 of the act of 1887, does not attach, owing to necessary litigation and other unavoidable cause of delay above mentioned, and that the amount of said tax is only liable to a penalty of six per cent. from July 2, 1893.

An order will be entered in accordance with the foregoing.

In the Matter of the Judicial Settlement of the Estate of
SARAH D. KIRKPATRICK, Deceased.

(Surrogate's Court, Orange County, Filed May, 1894.)

EXECUTORS—ACCOUNTING—LIMITATION.

The right of a creditor to compel an executor or administrator to account is barred by the statute of limitations at the end of seven years after the issue of letters.

Proceeding to compel accounting and payment of the petitioner's claim.

Harrison W. Nanny, for petitioner; John F. Bradner, for administrator c. t. a. and one surety on administrator's bond.

McELROY, Sp. S.—This is a special proceeding instituted by the petitioner to compel the administrator c. t. a. to render an account and pay the claim of the petitioner.

The records in the Surrogate's Court of Orange county show that letters testamentary were granted by this court to Franklin

Varney, the sole executor named in the will of Sarah D. Kirkpatrick, deceased, on the 19th day of May, 1876, and that on the 8th day of January, 1877, an inventory was filed by said executor, amounting to the sum of \$2,121.72, or thereabouts.

It further appears that the said Franklin Varney died without having had a judicial settlement of his account, and that on the 21st day of February, 1879, letters of administration c. t. a. were issued by this court to Gilbert M. Varney, and that his letters have never been revoked. No further proceedings of any kind have been had in this estate subsequent to the appointment of said administrator c. t. a., in February, 1879, until the 5th day of February, 1894, a period of fifteen years, when one Delia Riggs presents a petition to this court, alleging in substance: (1) That more than eighteen months have elapsed since the grant of letters of administration c. t. a. (2) That the petitioner, on the 11th day of January, 1894, recovered a judgment against the administrator c. t. a. of the goods, chattels and credits of Sarah D. Kirkpatrick, deceased, for the sum of \$350.82, and that said administrator c. t. a. has not rendered an account of his proceedings, nor paid petitioner the amount due her as aforesaid, and demanding that said administrator c. t. a. be ordered to account and pay her said claim.

Upon filing this petition with the court a citation was issued, requiring the administrator c. t. a. to show cause why he should not account and pay the claim of petitioner.

On the 13th day of March, 1894, the return day of said citation, the administrator c. t. a. appears and files an answer, alleging in substance that more than fifteen years have elapsed since the right to compel an accounting accrued, and that the court is barred by the statute of limitations from compelling this administrator c. t. a. to account. A further answer was subsequently filed denying the claim of petitioner.

We have, therefore, two questions presented for our consideration: (1) Is the statute of limitations a bar to the right of a creditor to compel an executor or administrator to account

after six years have elapsed since the right to compel such accounting accrued? (2) Is the claim of the petitioner a valid claim against the estate of Sarah D. Kirkpatrick, deceased?

The claim of the petitioner is upon a judgment recovered in the Supreme Court upon a note, of which the following is a copy:

“Middletown, N. Y., Apr. 8th, 1889.

“Twelve months after date I promise to pay to the order of Zenas Riggs three hundred dollars, at the First National Bank of Middletown, for value received, 6 per cent. interest.

“G. M. VARNEY, Admrtr.”

The petitioner, in her complaint in that action, alleges that the consideration of said note was the funeral expenses and other preferred debts of said deceased, paid by the payee of said note to the said administrator c. t. a., at his request; that the note was duly transferred to the petitioner.

Testimony was also received showing that some part of the money representing the consideration of this note was used in repairing real estate of which Sarah D. Kirkpatrick died seized, situated at Slate Hill, N. Y.

In view of the fact that the testatrix died in 1876, and that she left an estate of the value of over \$2,000, I am unable to see any reason for the administrator c. t. a., some thirteen years afterward, to borrow money for the payment of “funeral expenses and other preferred debts of said deceased.”

However, this claimant stands in the shoes of Zenas Riggs, the payee of this note, and she can have no greater rights against this estate than he possessed. It does not appear that this note was ever presented to the administrator c. t. a. as a claim against the estate of Sarah D. Kirkpatrick, deceased, either by the original payee or the present owner of the note, and accepted or rejected by the administrator c. t. a., nor does it appear that the claimant ever offered to refer such claim, and that such offer was refused. I fail to see how the claimant's judgment

should be entitled to any weight as evidence of a debt against this estate (Code, § 1210), for a judgment upon a trial upon the merits is only presumptive evidence of a debt due from the decedent (Code, § 2756), and this is conceded a judgment by default.

But, assuming that a debt is established by this judgment, then as contended by the counsel for the petitioner, "some person or estate owes the petitioner, and it is proper to ask who, or what estate owes it."

An executor or administrator has no power to bind an estate by a new contract, nor can he revive a demand which has once expired, even though it be his own claim; nor can his contracts or admissions have the effect of creating the one or reviving the other.

In *Schmittler v. Simon*, 101 N. Y. 557, Chief Justice RUGER says: "Neither executors nor administrators have power to bind the estate represented by them through an executory contract having for its object the creation of a new liability, not founded upon the contract or obligation of the testator or intestate. They take the personal property as owners, and have no principal behind them for whom they can contract. . . . In actions upon contracts made by them, however they may describe themselves therein, they are personally liable, and in actions thereon the judgment must be *de bonis propriis*. Not so, however, upon contracts made by their testator or intestate; in such case the judgment is always *de bonis testatoris*." To the same effect, see *Barry v. Lambert*, 98 N. Y. 300; *McLaren v. McMartin*, 36 id. 88; *Austin v. Munro*, 47 id. 366; *Martin v. Platt*, 51 Hun, 429; *Glenn v. Burrows*, 37 id. 602; *Scott v. McMillan*, 16 St. Rep. 795; *Kedian v. Hoyt*, 33 Hun, 145; *Clapp v. Clapp*, 44 id. 451, and cases cited.

The claim of this petitioner is exclusively upon the undertaking of Gilbert M. Varney to pay the sum of \$300 in twelve months from April 8, 1889, with interest. There never was any liability on the part of the testatrix to the payee of this

note, and I am unable to see how any court could make the petitioner's claim a charge upon the estate of the testatrix, even though the whole consideration of this note represented the funeral expenses of the deceased, and the administrator c. t. a. has no power to make it a charge thereon except by payment, and then charging it in his accounts and having them passed upon in the usual way. *Ferrin v. Myrick*, 41 N. Y. 315.

There has been testimony received showing that about \$50 of this \$300 note was used for repairs on real estate belonging to the deceased. The fourth clause of the testatrix's will is as follows: "I authorize, empower, order and direct my executor to grant, bargain, sell and convey, and convert into money all my real estate and chattels real, of every name and kind, all my real estate and chattels real, of every name and kind, wherever situated, and to that end to make, execute and deliver all contracts, deeds or conveyances necessary or proper with or to the purchaser or purchasers, and until sold to take possession of, manage, rent out, lease or control the same as he may deem for the best interest of my estate, and to hold the same until it is, . . . but in his judgment to sell and dispose thereof, . . . to sell and collect personal property, etc., etc., and after payment of my debts and expenses aforesaid to pay and dispose of the residue to my legatees as follows:"

Assuming that this power, in reference to the disposition and management of the real estate, was, upon the death of the executor and the appointment of the administrator c. t. a., transferred to said administrator c. t. a., and that inferentially there was a power in said will to make repairs, etc., I fail to see how this claim of the petitioner can bind the estate of the testatrix, even to the extent of the value of the repairs made. The general rule is that a trustee cannot charge the trust estate by his executory contracts unless authorized to do so by the terms of the instrument creating the trust, and while there are exceptions to this general rule, yet to create a lien or charge there must be some agreement to that effect. It is evident that the claimant had no such agreement, for she alleges in her com-

plaint that the consideration of said note was the "funeral expenses and other preferred debts of said deceased" (New v. Nicoll, 73 N. Y. 127), and even though the administrator c. t. a. has used some part or all of the consideration of this note in making repairs upon the real estate of the testatrix, the petitioner could have no claim or lien without an express promise or agreement to make such a charge. But it is beyond the power of this court to decide the validity of the petitioner's claim, as such, or whether it is a claim against the decedent's estate, at least in this proceeding, and I will now consider the first question, viz.: "Is the statute of limitations a bar to this proceeding?" upon which the disposition of this proceeding alone can rest in my judgment.

There can be no doubt but what an answer pleading the statute of limitations can be justly interposed upon an application to this court for an order compelling an executor or administrator to account or pay a claim, and that the person thus cited to account may show in answer to the application any legal bar to the application, whether it be the statute of limitations, payment, a release or otherwise.

Chapter 4 of the Code of Civil Procedure provides for the limitation of actions, and the last clause of section 414 is as follows: "The word 'action,' contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action."

By this provision it would seem that it is intended to limit the remedy in Surrogates' Courts just as absolutely as the various remedies are limited in other courts; and the chapter is to be read as though the words "special proceedings" were substituted wherever the word "action" occurs.

By sec. 380 of the Code "The following actions must be commenced within the following periods after the cause of action has accrued."

"Section 382. Within six years:

" 1. An action upon a contract, obligation or liability, express or implied; except a judgment or sealed instrument.

" 2. An action to recover upon a liability created by statute; . . . "

Is the duty of an executor or administrator to account such an obligation or liability as mentioned in either subdivision of § 382 of the Code?

Prior to the enactment of the Code it was well settled that the statute of limitations began to run as soon as the right to compel an accounting accrued. *Borst v. Corey*, 15 N. Y. 505, 509. By sec. 2726 of the Code the Surrogate's Court may compel a judicial settlement of the account of an executor or administrator "where one year has expired since letters were issued to him."

The obligation or liability to account, therefore, accrues at that time, viz., when one year has expired since letters were issued, and it seems to me that a proceeding to compel an executor or administrator to account is a proceeding to enforce an "obligation or liability," such as was intended in either subdivision 1 or 2 under sec. 382 of the Code, and under whichever subdivision it may properly be considered such proceedings should be commenced within six years after the right to require it has accrued, or, in a case of this kind, within seven years from the grant of letters. *Matter of Nicholls*, 27 St. Rep. 87. The only exception is the one in favor of a legatee or distributee, under sec. 1819 of the Code, which can, however, in no way affect this proceeding. *Matter of Perry*, 37 St. Rep. 576; *Estate of Clayton*, 22 id. 886; *Matter of Van Dyke*, 9 id. 137; *Clark v. Ford*, 1 Abb. Ct. App. Dec. 359.

I am, therefore, of the opinion that this proceeding should be dismissed, for the reason that more than six years have expired since the right to compel this administrator c. t. a. to account accrued.

While it is true that six years had not elapsed since the note became due, and it also appears that this administrator c. t. a.

has sold some real estate of the deceased recently, yet at the time this note was given more than ten years had expired since the grant of letters of administration c. t. a. to Gilbert M. Varney, and if a creditor of the deceased could not, at the time this note was given, have instituted a proceeding to compel this administrator c. t. a. to account, certainly this claimant could gain no greater rights by a longer lapse of time, where the statute had already operated as a bar.

An order will be entered dismissing the petition herein.

(Note as to limitation of time to compel accounting:)

A creditor cannot compel an executor or administrator to account as to the personalty after the lapse of seven years and six months. (*Matter of Bradley*, 25 Misc. 261.)

It was held in *Matter of Taylor*, 30 App. Div. 213, that when an administratrix has received funds for which she has not accounted, the statute did not begin to run in her favor until she has publicly and officially renounced the trust; but this case was overruled in *Matter of Longbotham*, 38 App. Div. 607, holding that a proceeding to compel an administrator to account was controlled by the ten-year statute of limitations. (See, also, *Matter of Rogers*, 153 N. Y. 316.)

In the Matter of the Estate of RACHEL M. SPENCER, Deceased.

(*Surrogate's Court, Cattaraugus County, Filed May, 1894.*)

1. LEGACY—ABATEMENT.

Where, in a will made a short time before testator's death, the realty and personalty are blended in the residuary clause and the executor is given power to sell all the property if necessary to fulfil the bequests, general legacies do not abate because of insufficiency of the personalty to pay them in full.

2. EXECUTORS—POWER OF SALE.

Where the realty and personalty are blended, a power given the executor to sell all the property if necessary to fulfil the bequests authorizes him to sell the realty.

Proceedings upon intermediate accounting and for a construction of the will of deceased.

W. K. Harrison, for executors, legatees and guardian *ad litem*; John L. Murphy, general guardian of residuary legatee, in person.

DAVIE, S.—The testatrix died on the 29th day of December, 1892, leaving a will bearing date on the twenty-first day of the same month, which was admitted to probate on the 6th day of February, 1893, and letters testamentary thereupon issued to James L. West, executor.

By the terms of the will testatrix directed the payment of her debts, funeral charges and expenses of administration, and bequeathed the sum of \$200 to one sister, and \$100 to each of two other sisters; then follows a bequest of \$200 to Nellie O'Dell, a niece; \$100 to Spencer Quackenbush, a nephew, and \$50 to each of six other nieces and nephews. She then directs her executor to retain the sum of \$200 out of her estate, invest the same and expend the interest arising from such investment in keeping her cemetery lot in good condition, and further provided that "if it is not necessary to expend the whole amount of the interest on my lot in said cemetery, then the balance to be used in beautifying and in keeping the cemetery in good condition, as the proprietors of said cemetery may direct." The final disposing clause of the will is as follows: "All the rest and residue of all my property, both real and personal, I give and bequeath to Ella Quackenbush, absolutely; likewise, I make, constitute and appoint James L. West, with full power to sell all my property, if necessary to, to fulfill my above bequest, executor," etc.

It appears from the account filed that the personal estate of testatrix remaining after the payment of the debts, funeral expenses and costs of administration is but little more than half enough to pay the general legacies, and the questions now presented for determination are: First, must the general lega-

cies abate proportionately in consequence of the insufficiency of the personal estate to pay them in full, or can resort be had to the real estate for full satisfaction of the same; and, second, is the executor empowered by the terms of the will to sell and convey the real estate?

The personalty is not only the primary fund, but the only one liable for the payment of the general legacies unless they are charged on the realty by express direction, or by necessary implication; such a charge, however, may operate in aid of the personalty, furnishing an additional fund for the payment of legacies upon exhaustion of the personalty, or where the two species of property are blended together by the terms of the will, rendering them both liable for payment of legacies *pari passu*. 13 Am. & Eng. Ency. of Law, 110.

It will be observed that the residuary clause of the will deals with both the real and personal estate alike; the courts of this State, after much vacillation, appear now to take the position that this blending of the real and personal estate in the residuary clause is not sufficient in and of itself to charge the realty, yet it is a circumstance to be taken into consideration in ascertaining the testator's intention, and in connection with other circumstances may be controlling. *Hoyt v. Hoyt*, 85 N. Y. 142; *Scott v. Stebbins*, 91 id. 605; *McCorn v. McCorn*, 100 id. 511; *Anderson v. Davison*, 42 Hun, 431.

A charge will also be implied if the language of the will indicates that the testator intended the legacies to be paid in full, knowing that her personal property was insufficient for that purpose, or if it appears that she had her real estate in mind when determining the amount of her various bequests, although such real estate be devised (*Le Fevre v. Toole*, 84 N. Y. 95; *McCorn v. McCorn*, 100 id. 511); and extraneous circumstances may be considered in aid of the terms of the will. *Brill v. Wright*, 112 N. Y. 134.

In the case at bar the will was made only a few days prior to the death of the testatrix; hence no change occurred in the condition of her estate between the execution of the will and

her death; her estate, aside from the real estate and a small amount of household furniture and wearing apparel, consisted of money securities; testatrix was a woman of ordinary sagacity and business ability, and must be presumed to have comprehended the extent of her personal estate at the time of the execution of the will; the principal legatees are her sisters, while the residuary legatee is a niece, and there is nothing in the situation of the parties, as disclosed by the evidence, showing that this niece had any greater claim upon the bounty of the testatrix than her other relatives, especially her sisters; the claim that testatrix designed that the payment of the general legacies should be limited by the amount of the personal property is simply an imputation that the testatrix, desiring in view of approaching death to make some fair and reasonable disposition of her estate, designedly and intentionally incorporated in her will a series of legacies which were to a great extent meaningless and valueless; it seems much more reasonable to suppose that testatrix intended that the general legacies should first be paid in full, and that whatever might remain should go to the residuary legatee; there is nothing in this conclusion inconsistent to any extent with the phraseology of the will, and it is sustained fully and satisfactorily by the proof of the circumstances attending the execution of the will.

Having reached the conclusion that testatrix designed to make the general legacies a charge upon her real estate in so far as the personal estate was insufficient to pay them, her further intention to clothe her executor with ample authority to carry out the provisions of the will by a disposition of all her estate is equally apparent; the terms of the will are entirely susceptible of that construction; she designates and appoints an executor "with full power to sell all my property, if necessary to, to fulfill my above bequests;" the will is not very artistically drawn, but the carelessness of the scrivener cannot be permitted to defeat the evident intention of the testatrix. Where upon examination of a will taken as a whole the intention of the

testator appears clear, but its plain and definite purposes are endangered by inapt or inaccurate modes of expression, the court may, and it is its duty, to subordinate the language to the intention. *Phillips v. Davies*, 92 N. Y. 204.

It must be held in this case that the executor is clothed with ample authority to sell the real estate of testatrix and convert the same into money; that he should do so in the course of his administration, and out of the proceeds arising from the sale of the personal and real estate pay the general legacies, and the residue, whatever it may be determined to be upon judicial settlement, to the residuary legatee.

A decree will be entered accordingly.

In the Matter of the Estate of **HARRIET M. FOSTER**, Deceased.

(Surrogate's Court, Kings County, Filed May, 1894.)

EXECUTORS—ORDER OF PAYMENT.

Judgments recovered against the decedent in his lifetime are to be paid in the order of their docketing, irrespective of the time when the assets or fund were acquired.

Application for payment of a judgment recovered against the testatrix in her lifetime.

Lucius H. Beers, for petitioners; Putney & Bishop, for William Bingham; Olcott, Mestre & Gonzales, for John Monroe & Co.; H. G. Hull, for executor.

ABBOTT, S.—Harriet M. Foster died on September 29, 1892. She left a last will and testament, which was admitted to probate February 27, 1893.

On December 29, 1886, the petitioners in this proceeding secured a judgment in the New York Supreme Court against Harriet M. Foster, impleaded with others, upon which there is now due about \$68,000.

Other creditors, who oppose this application, also secured judgments against Harriet M. Foster in her lifetime, but they were all secured and docketed subsequently to the judgment in favor of the petitioners.

Letters testamentary of the last will and testament of Harriet M. Foster were issued out of this court to Chester M. Foster on February 27, 1893.

The only asset of the estate of Harriet M. Foster which ever came into the hands of the executor is a fund amounting to about \$5,300, proceeds of a recovery in a suit in equity brought by said executor after the decease of his testatrix for an accounting of certain transactions between testatrix in her lifetime and the defendants in that action.

The petitioners claim the entire fund in the hands of the executor under the statute giving priority in the payment of debts of deceased persons to judgment creditors in the order of the docketing of their judgments.

Whether the claim of the testatrix upon which her executor ultimately recovered his judgment was an asset at the time of her decease, or at the time of the recovery of the respective judgments, is immaterial for the purposes of the disposition of this question.

The authority cited by the learned counsel for the creditors, John Monroe & Co. and William Bingham (*Matter of Hazard*, 73 Hun, 22), has no application whatever to the particular question submitted for my determination. In that case an application was made for the distribution of surplus moneys arising out of the sale in foreclosure proceedings of real property of the decedent. The real property from the sale of which surplus arose was acquired by the decedent after the recovery and docketing of all the judgments under which claims for the sur-

plus were made. It was very properly decided in that case that no priority of lien existed in favor of any of the judgment creditors on account of priority in the docketing of the judgments in the county in which the land was situated.

The creation of all such liens and rights to the priority of payment of one class of claims over those of others is purely artificial and the creation of legislatures. Each legislative enactment must receive its own peculiar construction according to the language used in the creation of such artificial rights.

The language of the legislature construed in *Matter of Hazard*, 73 Hun, 22, is: "All judgments hereafter rendered in any court of record shall bind and be a charge upon the lands," etc.

A definite and specific charge and lien is created upon the specific real property of which the judgment debtor is seized, situated in the county in which the judgment is docketed; when the ownership of the land follows the docket of the judgment the conclusion seems reasonable that such ownership shall relate back to the lien of all the docketed judgments equally, because the event which creates the lien in that case is not the docketing of the judgment, but the acquisition of the land. The authority cited and the statute construed relate exclusively to the subject of liens.

In the statute under which the pending application is made there is no suggestion of a lien or charge upon any of the property of the deceased person whose estate is to be distributed.

"Every executor and administrator shall proceed with diligence to pay the debts of the deceased and shall pay the same according to the following order of classes:

"1. Debts entitled to a preference under the laws of the United States.

"2. Taxes assessed upon the estate of the deceased previous to his death.

"3. Judgments docketed and decrees enrolled against the deceased according to the priority thereof respectively.

"4. All recognizances, bonds, etc.

"No preference shall be given in the payment of any debt over other debts of the same class, except those specified in the third class." 2 R. S. 87, secs. 27, 28.

Here there is no suggestion of a lien or charge upon any part of the assets of the testator.

The statutory rule is laid down for the guidance of executors in the settlement of their estates.

Given a fund for distribution, upon which there are no specific liens, and for which they are accountable as executors, they seek the statute for the purpose of learning what disposition to make of the fund. They are there directed "to pay the debts of the deceased according to the following order:"

There being no debts under either the first or second class, they are next to pay "judgments docketed and decrees enrolled against the deceased according to the priority thereof respectively."

Moreover, this class is made the only exception in which preference is "given in the payment of any debt over other debts of the same class."

The statutory provision above quoted may or may not be equitable, but I have no doubt whatever as to the intention of the legislature.

Let a decree be submitted on two days' notice.

(Note.—Affirmed by General Term without opinion, 84 Hun, 610.)

county treasurer or comptroller of the city of New York to repay such equitable proportion, *dum ferve opus*, but the surrogate of the proper county? No other method is pointed out than that conferred upon that official by section 10 referred to above. The comptroller of the State is clothed with no power in this respect, and it must exist somewhere, or there is no machinery provided for enforcing a compliance. But when the tax shall have been actually paid into the State treasury, then, and not until then, the State comptroller, under section 6, is for the first time invested with authority to refund, or to order a refunding, in the mode there prescribed.

An order may be entered directing the county treasurer to refund the amount of the tax.

(Note as to refunding of Transfer Tax:)

A surrogate has the power, on notice to the comptroller, to modify the decree and direct the refunding of the tax erroneously paid. (Matter of Sherar, 25 Misc. 138.)

Where a transfer tax which was assessed without jurisdiction is vacated by the surrogate, mandamus will lie to compel the comptroller to direct the county treasurer to refund the tax. (Matter of Coogan, 27 Misc. 563.)

In the Matter of the Judicial Settlement of the Accounts of
ALONZO HAVENS et al., as Executors.

(*Surrogate's Court, St. Lawrence County, Filed May, 1894.*)

1. SURROGATES—JURISDICTION.

On an accounting by executors the surrogate has jurisdiction to construe the will.

2. SAME.

Where a legatee claims the entire legacy and another claims as assignee of the whole or a part thereof, the surrogate has jurisdiction to determine the controversy between them.

Judicial settlement of accounts of executors.

Isaac L. Wells, for executors; R. E. Waterman, for Samuel W. Havens.

VANCE, S.—In this matter the executors of the last will and testament of the deceased have petitioned for a judicial settlement of their accounts; all parties interested in the estate have been cited and Samuel W. Havens, one of the children of the deceased, has appeared. The executors have filed their account showing a balance of \$5,391.59 in their hands, subject only to the commissions of the executors and the expense of this accounting. No objection has been made to any item of the account as filed. The correctness of the balance in the hands of the executors is conceded. The executors in their account allege that, under the provisions of the will and codicils thereto of the deceased, Alonzo Havens is entitled to the whole surplus now in their hands. This claim on the part of the executors is denied by Samuel W. Havens, who claims that, under the provisions of the will and codicils thereto of the deceased, he is entitled to one-half of the net surplus of the estate; he also alleges, in substance, that, by an agreement heretofore made by and between himself and Alonzo Havens, it was, for a valuable consideration, agreed that the said Samuel W. Havens should have one equal half of the surplus. The alleged agreement, it is stated, arose out of a contest concerning the probate of the will. The records of this court show that the will of the deceased was contested before my predecessor in office, and after such contest admitted to probate. Samuel W. Havens now alleges that, while such contest was pending, Alonzo Havens agreed with him, that if he would not be a party to the contest, but would join with said Alonzo and endeavor to sustain said will, that in consideration thereof he should receive an equal share of the surplus of the estate with said Alonzo, which said Samuel W. agreed to do, and that said Samuel faithfully and carefully carried out said agreement. It

is intimated that the questions thus arising deprive this court of jurisdiction. I would gladly be relieved from the labor and responsibility of the trial and decision of the question thus raised, yet, whatever may be the personal consequences, I must examine and determine the question of jurisdiction under the statutes as I understand them.

The objections filed by Samuel W. Havens raise two questions—one of law, and the other a mixed question of law and fact. The first subdivision of such objections, taken with the allegations of the executors in the account, raises purely a question of law, namely, the construction of the will and codicils. Has the surrogate jurisdiction to determine this question?

The Code, section 2472, subdivision 3, provides that the Surrogate's Court has power "To direct and control the conduct and settle the accounts of executors, administrators and testamentary trustees." Subdivision 4, "To enforce the payment of debts and legacies, the distribution of the estates of decedents, and the payment or delivery by executors, administrators and testamentary trustees of money or other property in their possession belonging to the estate." Subdivision 6, "To administer justice in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto." By section 2743 it is provided that "Where an account is judicially settled as prescribed in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, a decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights." By section 2481, subdivision 11, it is provided, among other things, that the Surrogate's Court has power "To exercise such incidental powers as are necessary to carry into effect the powers expressly conferred."

In the Matter of the Estate of Young, 92 N. Y. 235-238, upon an application to cause the executor to set apart the exempted articles to the widow, it was held that the surrogate had jurisdic-

tion, under his authority "To direct and control the conduct of executors and to administer justice in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto," to construe an ante-nuptial agreement made between the widow and her deceased husband.

The Court of Appeals in *Matter of Verplanck*, 91 N. Y. 439, 450, has held that, as incident to the duties cast upon the Surrogate's Court by the provisions of section 2743, the surrogate must have jurisdiction to construe wills, so far as needful, at least, to determine to whom legacies shall be paid. See, also, *Garlock v. Vandevort*, 128 N. Y. 374.

It would seem that these authorities settle conclusively that the surrogate has jurisdiction to determine the matters raised by the first subdivision of the answer or objection of Samuel W. Havens.

The second subdivision of the objections made by Samuel W. Havens raised two questions—one of fact and one of law: First, Was the alleged agreement made? Second, If made, is it a valid agreement?

As to the latter question there is no room for a doubt. If this court, as an incident to powers expressly granted, may construe wills and ante-nuptial agreements, as the cases above cited hold, why has it not power to construe any other writing or agreement? The power to construe an agreement necessarily includes the power to pass upon its validity.

Thus I reach the conclusion that the question of law raised by the second subdivision of the objections filed may be determined by the court.

The only question remaining is, has this court jurisdiction to try the question of fact raised—to determine, in case the will be construed to mean that Alonzo Havens is the sole residuary legatee, whether or not he has transferred one-half of his legacy to his brother Samuel W. Havens?

In other words, on an accounting when the legatee claims the whole amount of the legacy, and another claims to be an assignee

of the same or a portion thereof, can this court determine the controversy between them?

It is commonly asserted that a Surrogate's Court has no jurisdiction to try a disputed claim. This assertion may or may not be true. It may be safely stated that, as a general rule, such court has no jurisdiction to try and determine the validity of a disputed claim against an estate.

In a proceeding under section 2718 to compel the payment of a debt, legacy or distributive share, when the executor or administrator makes the verified answer prescribed by that section denying the validity thereof, the surrogate must dismiss the proceeding without prejudice to an action or accounting in behalf of the petitioner.

Under proceedings for the sale of the real estate of the decedent any claim may be contested before the surrogate, even a claim which has been presented to the executors or administrators and rejected by them. *In re Haxtun*, 102 N. Y. 157.

The statute having, as above seen, conferred jurisdiction in one proceeding to try and determine the validity of a disputed claim against an estate, and prohibited such jurisdiction in another proceeding before the same court, it seems clear that the question of jurisdiction in any proceeding must be determined by the statutory provisions relating thereto. This being so, a decision upholding or denying jurisdiction in one proceeding is no authority for or against the jurisdiction in any other proceeding. A failure to recognize this fact has led to confusion and, I believe, error.

Another expression frequently used is that a surrogate's court has no general equity jurisdiction. Just how much is meant by the word "general" no one has attempted to define. Its use implies that at least a limited equity jurisdiction is possessed by that court. What is the line of division between the limited equity jurisdiction which it is conceded has been conferred upon the court and the general equity jurisdiction which it does not possess?

Subdivision 6 of section 2472 gives to a Surrogate's Court power "to administer justice in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto."

If the last clause, "according to the provisions of the statutes relating thereto," had been omitted in defining the power granted by the subdivision above cited, I am of the opinion it would have amounted to a grant of full or general equity jurisdiction in all matters relating to affairs of decedents; to do justice in all such matters is to do what is right and equitable therein.

How far is this power to do justice (or equity) in all matters relating to the affairs of decedents limited by the clause "according to the provisions of the statutes relating thereto?" Is this a limitation of the equitable powers of the court as to the subject-matter over which those powers may be exercised? Or is it a limitation only as to the manner in which they shall be exercised? Clearly the latter. Here, then, we have a grant of equitable powers in all matters relating to the affairs of decedents coming before the court in the manner provided by the statute.

But this general power is limited by restrictions upon its exercise found in the provisions of the statute relating to the various special proceedings which may come before the court.

I have, therefore, arrived at the conclusion that a Surrogate's Court has full, equitable jurisdiction in all matters relating to the affairs of decedents, except so far as that jurisdiction may be limited by the provisions of the statute relating to the special proceedings in which the question of jurisdiction may arise.

In most of the cases which I have examined the general proposition is asserted that no general equity jurisdiction is conferred, and then an effort is made to find authority, either direct or incidental, in the provisions of the statute relating to the special proceeding before the court, and if not there expressly conferred, then its existence has been denied.

The power granted by subdivision 6, above cited, in most cases

where the decision has denied jurisdiction, has been generally unnoticed.

Starting, then, with the proposition that upon an accounting the Surrogate's Court has jurisdiction to do justice or equity between all persons properly before it in all matters relating to the estate, let us inquire how far such power has been limited by the provisions of section 2743. That section provides: "When an account is judicially settled as prescribed in this article, and any part of the estate remains, and is ready to be distributed to the creditors, legatees . . . or their assigns (the point reached in this matter), the decree must direct the payment and distribution thereof to the persons entitled according to their respective rights."

Thus far, instead of a limitation upon the equitable powers of the court, we have imposed a duty to distribute the fund on hand between the legatee and his assignee, if there be one, according to their respective rights.

The imposing of a duty confers power for its performance, and that power thus conferred carries with it such incidental powers as are necessary to carry it into effect. Subd. 11, sec. 2481.

How, in this case, can this court make a decree for the distribution of this estate to the legatee and the other claimant according to their respective rights without determining their rights? In order to determine the rights of those parties, the court must try the controversies between them.

A question may be raised as to the effect of that portion of sec. 2743 which provides that "Where the validity of a debt, claim or distributive share is not disputed or has been established, the decree must determine to whom it is payable," etc.

This clause undoubtedly prohibits a Surrogate's Court from trying a disputed debt or claim against the estate; but what can be meant by the validity of a distributive share?

The distributive share of a legatee is fixed by the will, and in cases of intestacy by the Statute of Distributions. We have seen before that as to a legacy a Surrogate's Court has full power to

construe the will, and no court would assume to question the validity of the Statute of Distributions.

As to the clause under consideration, I concur fully with the opinion expressed in *Du Bois v. Brown*, 1 Dem. 317, that the words "distributive share" must have been inadvertently used, and that the only intent of that clause was to settle the question which had long agitated our courts as to the jurisdiction of a surrogate, upon the judicial settlement of the accounts of the executor or administrator, to try a contested claim against the estate.

From an examination of the statute I am strongly of the opinion that jurisdiction to try the issue raised exists in this court.

I will not, however, determine the question upon my own construction of the statute, but will examine the authorities bearing directly upon the point raised.

Redfield, in his valuable work on the Law and Practice in Surrogate's Court (4th ed., p. 752), says: "Where the original party in interest and the alleged assignee both claim the same interest, the surrogate cannot try the question of the validity of the assignment," and cites in support of this proposition *Decker v. Morton*, 1 Redf. 477, and *Matter of Estate of Heelas*, 5 id. 440.

An examination of the case of *Decker v. Morton* reveals the fact that the surrogate did pass upon the validity of the assignment, holding it invalid. Upon appeal to the General Term, INGRAHAM, J., delivering the opinion of the court, says: "It is not clear that the surrogate had any jurisdiction to try the question as to the validity of the assignment. . . . But upon the merits I think the surrogate, if he had jurisdiction, did not err."

Slight authority in favor of the proposition stated, but all its force is dissipated when we consider that the case was decided under the provisions of the Revised Statutes, in which "assignees" were not enumerated among those to whom payment or distribution was to be decreed "according to their respective rights."

The other case, *In re Estate of Heelas*, was decided under the Code. All that was held in that case was, that creditors of a distributee are not proper parties to an accounting of the administrator, and cannot there contest the validity of an assignment of his distributive share, and the share was decreed to be paid to the assignee.

In that case the surrogate says: "As the statute now authorizes the court to decree payment to an assignee of a legatee or next of kin, etc., if the assignor were to appear on such an accounting and dispute the validity of the assignment, doubtless it would be the duty of the court to hear and determine the controversy in order to decree payment to the person entitled thereto."

In *In re Brown*, 3 Civ. Pro. Rep. 39, it was held that the court had no jurisdiction to determine the validity of an assignment. On the other hand, it has been held in *In re McCabe's Estate*, 18 N. Y. Supp. 715, that under section 2743, the surrogate, in settling an account, has power to try and determine the validity of an assignment of his distributive share by one of the next of kin, who appears and attacks the assignment on the ground that it was made without consideration, and was procured by false and fraudulent representations.

In *Matter of the Estate of Orser*, 4 Civ. Pro. Rep. 129, it was held that section 2743 does not forbid surrogates from deciding a controversy in regard to the title, or any other question concerning a legacy or a distributive share.

The authorities upon the specific question presented seem to be in favor of the jurisdiction of the surrogate.

It is to be regretted that the precise question here involved has not been squarely passed upon by the higher courts.

In the case of *Riggs v. Cragg*, 89 N. Y. 479-491, the Court of Appeals held that the Surrogate's Court had no authority to try an issue as to the validity of a legacy raised by an executor on an application for an order directing him to pay the legacy.

In discussing the question of jurisdiction presented by that issue the court says: "When the surrogate, upon such an application, can see that other persons claim or may claim the same thing as the petitioner, and that a real question is presented as to the right of one of several persons to the legacy or fund, natural justice requires that he should not proceed to a determination without the presence of all the parties who may be affected by the adjudication. The statute provides for bringing in all the parties in interest on the final accounting, and in that proceeding jurisdiction is conferred to settle and adjust conflicting rights and interests, while no such authority is conferred in the special proceeding in favor of a single creditor or legatee, and such authority was not, we think, intended to be given."

Here is a clear expression of the opinion that under the Revised Statutes the surrogate had jurisdiction on a final accounting to settle and adjust the conflicting rights and interests of all the parties before him as to the legacy or fund.

In *Matter of Verplanck*, 91 N. Y. 439-450, the court, in speaking of the powers of the surrogate under the Code of Civil Procedure, as compared with those granted by the Revised Statutes, says: "It was clearly not the intention of the Code to narrow or diminish the jurisdiction of surrogates, but rather to enlarge it." The section under consideration, 2743, contains an illustration of the intent to enlarge the jurisdiction in that it includes assignees of a creditor, legatees, next of kin, husband or wife among those to whom the decree must make distribution.

By the weight of authority, as well as by my own understanding of the provisions of the Code, I am constrained to overrule the objection made to the jurisdiction of the court, and hold that it has jurisdiction to hear and determine all the questions raised by the objections filed by Samuel W. Havens.

Ordered accordingly.

In the Matter of the Assessment of the Estate of
FAYERWEATHER, Deceased.

(Surrogate's Court, New York County, Filed May, 1894.)

TRANSFER TAX—EXEMPTION.

The exemption of religious corporations in section 2 of the Transfer Tax Law of 1892 does not apply to foreign corporations.

Appeal from an order assessing the tax on a legacy.

Howard A. Taylor, for legatee; Emmet R. Olcott and Edgar J. Levey, for comptroller.

FITZGERALD, S.—This is an appeal from an order heretofore entered herein, assessing the transfer tax upon a legacy of \$100,000 bequeathed to Lincoln University. The appellant claims to be entitled to exemption from taxation under the transfer tax act, as a religious corporation. The Lincoln University was incorporated by an act of the legislature of Pennsylvania. From its charter it appears that it was established as an “institution of learning for the scientific, classical and theological education of colored youth of the male sex,” and was empowered, among other things, “to provide libraries, apparatus and all other needful means of imparting a full and thorough course of instruction in any or all of the departments of science, literature, the liberal arts, classics and theology.” While the theological department of the university is under the supervision of the assembly of the Presbyterian Church, the university admits “colored pupils, of the male sex, of all religious denominations.” The controversy between counsel was very spirited as to whether the appellant answered the definition “religious.” While I have grave doubt that it is included in that term, I prefer to base my decision upon another ground. A statute of a State granting privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the

State over which it has the power of visitation and control. *In re Prime*, 136 N. Y. 347; *Vanderpoel v. Gorman*, 140 N. Y. 563, 575. It is the policy of society to encourage benevolence and charity. But it is not the proper function of the State to go outside of its own limits, and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large. *In re Prime, supra*. Assuming that Lincoln University is a "religious corporation," I am of opinion that, as the act manifests no intention on the part of the legislature to include foreign corporations within the exemption, it must be restricted to religious corporations organized under the laws of the State of New York. The order appealed from is affirmed.

Decreed accordingly.

In the Matter of the Estate of RAMEL WENTZ, a Minor.

(*Surrogate's Court, Cattaraugus County, Filed June, 1894.*)

1. GUARDIANS—CUSTODY OF MINOR.

The right of a guardian to the custody of his ward is not an arbitrary one, but he must make such disposition of the ward's custody as will best promote his interests.

2. SAME—REFUSAL TO CONTRIBUTE.

Where the ward is well cared for and attached to the person with whom he resides, the guardian is not justified in refusing to contribute to his support on the ground that he refuses to leave such person and reside with the guardian.

Application for a decree directing the guardian of the minor to reimburse the petitioner for past support of the minor, and for an allowance for his future support.

V. C. Reynolds, for petitioner; E. D. Northup, for guardian.

DAVIE, S.—On the 16th day of April, 1894, Mrs. Sarah Blair filed her petition, alleging that she is the person with whom the minor resides; that she has supported and maintained him for several years last past; that he has funds in the hands of his guardian properly applicable to his support, and that the guardian refuses to make any allowance out of the funds of the estate for the maintenance of the minor, and praying that a decree be made directing the guardian to pay to the petitioner some proper sum to reimburse her for the expense incurred in the support of the minor in the past, and for an allowance for his future support.

On the return day of the citation the guardian interposed an answer controverting the validity of the claim for past support, and alleging that the welfare of the minor is being jeopardized by continuing his residence with the petitioner, and asking that his rights as guardian to the custody of the minor be determined as a condition precedent to any liability on his part as such guardian for the support of the minor. The authorities are conflicting as to the jurisdiction of the surrogate's court to determine the validity of disputed claims against the estate of a minor; this jurisdictional question arose in *Welch v. Gallagher*, 2 Dem. 40, and in the *Matter of Stoeher*, 23 N. Y. Supp. 281, and in each instance it was held that no such power existed; but in the *Matter of Kerwin*, 59 Hun, 589, the General Term holds directly to the contrary, and in discussing the somewhat general authority to regulate the conduct of guardians conferred upon Surrogate's Courts by the provisions of subdivision 7, sec. 2742, and sec. 2846 of the Code of Civil Procedure, says: "We know of no authority which restricts the jurisdiction of the surrogate to cases where the demand for the support is undisputed." Consequently it would seem that if the prayer of the petition for reimbursement for past support is to be denied, it must be upon some other grounds than that of want of jurisdiction; but upon a careful review of all the evidence I am clearly of the opinion that the situation will not justify an allowance for the mainte-

nance of the minor prior to the date of filing the petition in this proceeding, and the facts leading to that conclusion will be discussed to some extent hereafter; so, then, this proceeding resolves itself into an application under the sanction of sec. 2846 of the Code of Civil Procedure for a decree making suitable directions for the minor's future maintenance.

The guardian is an uncle of the minor, and was appointed upon his own petition on the 5th day of July, 1893, and directly thereafter he received the sum of about \$1,700, the amount of the estate in the hands of a former guardian upon his resignation and judicial settlement as such. The minor is of the age of ten years; his mother died when he was ten months old; upon her death the father procured a home for the minor with the petitioner, where the father and this minor and an elder brother continued to reside until the death of the father, about five years ago. Prior to his death the father paid petitioner for the support of the minor, but since the 6th day of July, 1889, she has received no remuneration whatever for the maintenance of the minor, aside from the sum of \$15 paid her by the guardian. The petitioner is a married lady of the age of fifty-four years, residing with her husband in the village of Salamanca, having a comfortable home, a woman of irreproachable reputation and integrity, with no children of her own residing at home, kind and affectionate towards the minor, watching over him with a tender regard and motherly solicitude; the minor, having no recollections of his own mother and no remembrance of any other home, has become greatly attached to Mrs. Blair, respects her authority and loves her as a mother, and, under her influence and tutelage, has learned good manners and morals; no closer relations could exist between this minor and Mrs. Blair, or his interests be better protected, were they in fact parent and child.

The guardian, in justification of his refusal to make any provision for the minor's support while he remains with Mrs. Blair, urges that, by virtue of his appointment as general guar-

dian of the person and estate of the minor, he is vested with an arbitrary authority to determine the place of domicile of his ward, and that he is reasonably exercising such authority while endeavoring to coerce the minor, by means of his refusal to contribute to his support, to abandon the only home he has ever known. It is true, as a general rule, that the rights and duties of a guardian relating to the person of the ward are those of a parent; ordinarily the guardian has the right to the custody of the ward, and no court will interfere with a reasonable exercise of such right; but such right is by no means an absolute and arbitrary one; the paramount duty of the guardian is to make such a disposition of the minor's custody as will best promote his interests, and if the guardian fails in so doing, it is not only the right, but the imperative duty of the court to interfere. The single consideration in determining whether he is properly performing the duties of his trust is the welfare of the ward; the guardianship is not created for the personal benefit of the guardian to any extent; the individual interests and wishes of the guardian or of Mrs. Blair cannot be considered; the single question presented is, what is best for the minor? *People ex rel. Pruyn v. Walts*, 122 N. Y. 238; *Matter of Welch*, 74 N. Y. 299.

It appears from the evidence that a proceeding was commenced several years ago by habeas corpus, instituted by the former guardian to procure the custody of this minor from Mrs. Blair; and while the result of that proceeding is not disclosed, the minor was permitted to remain in her custody; there is no direct proof upon that subject, but the suggestion is made, and the inference from all the facts in the case is reasonable, that Mrs. Blair, in consequence of her solicitude to retain the custody of the child, proposed to do so without expense to his estate; that fact, however, should not be permitted to defeat this application, for there is no pretense or suggestion that such arrangement was made for any definite length of time, and the filing of the petition in this proceeding was sufficient notice that

Mrs. Blair did not feel able to continue the gratuitous maintenance of the minor.

The desire and intention of the guardian is to take the minor to reside in his own family; will the interests of the minor be subserved by so doing? I am far from being convinced of the wisdom or propriety of such a course; the minor, who is a bright and intelligent youth, expresses a decided preference in this matter; being sworn as a witness, he said, "I wish to live with Mr. and Mrs. Blair; they are kind to me;" and when asked for a reason for such preference, he said, "I love Mrs. Blair—no one better; that is my home." It is undoubtedly true that too much weight ought not to be given to a mere childish preference; and, as was so well said by Justice MASON in *The People ex rel. Wilcox v. Wilcox*, 22 Barb. 183, where this same subject was considered, "This is no more than we should expect; it is the infant heart speaking its simple language in behalf of those who have nurtured, fed and watched over it from its first impressions and recollections for a period of almost nine years; it is the hand that has fed, the eye that has watched, and the heart that has showered its smiles and caresses upon the infant for the first nine years of its existence, that may confidently claim its love and affection." Yet, in this case, I am satisfied that the expressed preference of the minor is more the result of intelligent thought and consideration than of mere childish sentiment.

The petitioner in this case is in every respect a proper person to have the custody of the minor; her influence over him, tempered as it is by an ardent maternal affection and earnest solicitude for his welfare, is developing him in intelligence, manhood and integrity; and it is difficult to determine with any degree of certainty what might result from breaking up, against the minor's earnest protest, his present relations, and surrounding him with new and untried influences; it is an experiment which ought not to be tried.

The guardian himself, upon his cross-examination, concedes

the equity of the petitioner's claim for assistance in case the minor is left with her; he is asked, "Did you ever tell any one that Mrs. Blair was entitled to anything for the support of Ramel?" to which he answered, "I think I told Mr. and Mrs. Blair so; I thought so at the time, and think so now; I think Mrs. Blair ought to have pay for her trouble."

After a careful consideration of all the evidence I am unable to see how the guardian is justified to any extent in refusing to contribute out of the estate to the support of the minor simply because the minor declines to abandon his present home and reside with the guardian.

A decree will be accordingly entered denying the prayer of the petition in so far as it relates to a claim for past support, but directing the guardian to pay to the petitioner out of the funds of the estate the sum of two dollars and fifty cents per week for the maintenance of the minor until the further order of the court herein, such payments to date from the filing of the petition herein.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Estate of
CHARLES W. WYATT, Deceased.

(Surrogate's Court, Orange County, Filed June, 1894.)

1. WILL—CONSTRUCTION.

Where a bequest of income provides that "if she shall need the personal property for her comfort, maintenance and support, she may use the whole or any part thereof," the power of disposition is not absolute, but conditional on her needs, and a remainder over is not repugnant.

2. SAME—REQUEST TO CLASS.

The residue, upon the death of the widow, was given to the children of testator's deceased brothers and sisters and the children of his wife's deceased sisters, "so that each one of our said nephews and nieces shall take an equal share." *Held*, that the children of the sisters of testator and his wife who were living at the latter's death were not entitled to take.

3. EXECUTORS—DISTRIBUTION—LIFE TENANT.

Where an insurance of property extends beyond the life of the life tenant, the estate of the life tenant can only be charged with a proportionate part of the premium.

4. WILL—CONDITIONAL BEQUEST.

A bequest to a nephew conditioned that he should care for the widow and treat her "as a son would treat a mother, caring for her and doing for her as she shall reasonably desire," does not require him to pay for a trained nurse during her sickness, especially where she makes no request therefor.

The testator, Charles W. Wyatt, of the town of Newburgh, died in the fall of 1892, leaving him surviving his wife, Mary J. Wyatt, but no children or descendants of a child or children. He was also survived by two sisters, Mercy Dryer and Eunice Dougherty, each of whom have several children, nephews and nieces of the testator. The testator was also survived by a large number of nephews and nieces, the children, respectively, of five deceased brothers and sisters. The will of the deceased, dated March 8, 1892, and a codicil, dated September 8, 1892, were duly admitted to probate by the surrogate's court of Orange county, and upon this accounting a construction of the third and fifth paragraphs of testator's will is asked, and it seems to the court necessarily required.

The testator first gives all the household furniture, beds, bedding, dishes, silverware, etc., to his wife absolutely. Then a bequest of \$800, upon the death of his wife, is made to testator's nephew, John W. Reid. This bequest is changed in the codicil, but only in amount. Five hundred dollars, instead of \$800, is to be paid to said nephew on the death of testator's wife. The third and fifth paragraphs, upon which a construction is asked, are as follows:

"Third. All the rest, residue and remainder of my property and estate, real and personal and mixed, of every nature and kind, and wherever situated, I give, devise and bequeath to my dear wife, Mary Jane Wyatt, for and during the full term of the natural life of my said wife, to have, hold, use and enjoy the rents, issues and income thereof, and if she shall need the personal property of which I may die seized for her comfort, maintenance and support, she may use the whole or any part of it therefor."

"Fifth. On the death of my wife, I give, devise and bequeath all the personal property of which I may die seized, not hereinbefore given and bequeathed, and including such part of my personal property as my dear wife shall not have used up for her necessities, to the children of my deceased brothers and sisters and the children of my dear wife's deceased sisters, equally, share and share alike, so that each one of our said nephews and nieces shall take an equal share. In case any of our said nephews and nieces are dead, leaving child or children, the share which such nephew or niece would have taken if living, shall go to his or her child or children equally, share and share alike. My said nephew Albert C. Wyatt, and my nephew John W. Reid, are excluded from and shall not take under the provision of this, the fifth clause of my will, as I have specifically made provision for them hereinbefore; neither shall their children take under this clause, if they or them die before my dear wife; and the share which my nephew Charles W. Dewitt would take under this clause of my will shall go to and I give the same to his dear children, William E. Dewitt and Anna T. Presler, equally, each one-half of it; and in case of their death, or the death of either of them, then to their children equally, each branch of children taking the parent's share."

The personal estate left by testator, after payment of debts, etc., amounts to \$6,000, or thereabouts. Mary J. Wyatt, the widow of testator, died in October, 1893, leaving a will which has been duly admitted to probate.

Warner E. L. Ward, for accounting executor; James G. Graham, Jr., for executors of Mary J. Wyatt, deceased, and for several nephews and nieces of said deceased, and special guardian of C. Maud Coutant, a minor; Seward U. Round, for Chas. W. Dewitt, Wm. E. Dewitt and Anna T. Presler, and special guardian of Ida Dougherty, a minor; William M. Terpening and T. W. Tompkins, for other minors.

McELROY, Sp. S.—There is no connection, except in one particular, between the third and fifth paragraphs of this will. The latter becomes operative only after the complete enjoyment of the former, and our attention will be given to the questions submitted in the order in which the paragraphs appear in the will.

It is claimed by the executors of the estate of Mary J. Wyatt, deceased, that the whole personal estate of the testator, except such as was specifically bequeathed, passed to his wife, Mary J. Wyatt, absolutely under the third paragraph above, and should be paid to the executors of her estate by this accounting executor, for distribution among the persons entitled thereto under the will of said Mary J. Wyatt. The reason alleged by the counsel for the executors of Mrs. Wyatt's estate for this claim is that there was a power of entire user bequeathed to her in and by the said third paragraph of testator's will, which was equivalent to a bequest of the personal property to her absolutely.

It is well settled that where an absolute power of disposal is given to the first legatee a remainder over is void for repugnancy; yet, if the right of disposition by the first legatee is conditional, the remainder is not repugnant.

This testator gives and bequeaths to his wife, for and during the full term of her natural life, the residue of his estate, real and personal, to have, hold, use and enjoy the rents, issues and incomes thereof, and if she shall need the personal property of which the testator may die seized for her comfort, maintenance and support, she may use the whole or any part of it therefor.

In the wording of this will there is no absolute power of dis-

position of the personal estate given to testator's wife. "If she shall need the personal property of which I die seized for her comfort, maintenance and support, she may use the whole or any part of it (not absolutely, but) therefor."

That sentence expresses to my mind a condition which must first be shown to exist before she is entitled to any part of the *corpus* of testator's personal property absolutely. If she needs it for her comfort, her maintenance, her support, or either of them, the wife of testator is then authorized to use the whole or any part of testator's personal property therefor.

This must certainly limit the use of the *corpus* of testator's personal property by his wife, if any weight whatever is to be given to the words the testator uses as showing the state of affairs, the condition, that must exist before the right to use his personal property is to be exercised.

The reference counsel for the executors of Mrs. Wyatt makes to the fact that Mary J. Wyatt died within a year after the death of testator, and that she had not at that time, or the time of her decease, reduced the *corpus* of this personal property to her possession, will not be considered by me as affecting her rights in the least.

Suppose the executors of testator's estate had paid the whole fund of personal property to Mrs. Wyatt, I think testator's executors, and the residuary legatees under his will, would have had a right to be heard upon the settlement of her estate, and a claim by them as to the part of his estate which his wife had not used for her comfort, maintenance and support would have necessarily brought up this third paragraph of testator's will for construction in that proceeding. Nor is it necessary at this time to consider the question raised as to the validity of this trust. If that point is urged, it seems to me that the case of *Matter of Grant*, 40 St. Rep. 944, is in point. There the will of testator gave his wife the right to possess and enjoy the rents and profits of his estate during her life, and that, if they were not sufficient for her support, a sale might be had, with remainder over after

her decease. No trustee was provided for. Held, that the widow was entitled to the possession of the *corpus* of the estate. . . . Besides, it appears to me that the provisions of testator's will place his estate within the rule that a trust will be implied in executors when the duties imposed render the possession of the legal estate in the executors reasonably necessary, although it may not be absolutely essential to accomplish the purposes of the will, when such implication would not defeat, but would sustain the disposition of the will. *Tobias v. Ketchum*, 32 N. Y. 329; *Vernon v. Vernon*, 53 id. 357; *Morse v. Morse*, 85 id. 53; *Roberts v. Corning*, 89 id. 226, 237.

I have carefully examined the cases cited by counsel for the executors of Mrs. Wyatt, also the statutes in reference to powers, but am of the opinion that the various provisions in the wills therein construed are not in point or accord with the disposition this testator desired to make of his property.

In *Campbell v. Beaumont*, 91 N. Y. 464, the property of testator was devised to his wife for her sole use and benefit, accompanied by a clause that it was the testator's will and desire that whatever remained at the decease of his wife should be received and enjoyed by her son Charles. Held, that the widow took an absolute title unaffected by the provision for her son.

In *Crain v. Wright*, 114 N. Y. 307, the will gave land to the widow, "to have and to hold for her benefit and support." Held, that no intent was discoverable to pass less than a fee.

In *Hart v. Castle*, 30 St. Rep. 701, a father gave the residue of his estate to his sons and daughters, their heirs, etc., to be equally divided, and then provided that if either of the daughters should not leave children at her decease, her share should descend to her brothers and sisters, but that said daughters should have "the right to use and manage their shares in such a manner as they shall severally choose, and, if the income thereof shall be insufficient for their comfortable support, they may use as much of said share as may be necessary." Held, that an absolute power of alienation of the real estate was devised.

In each of the foregoing cases, as well as others cited by counsel in his brief, which I have examined, the wording is so different from testator's will that I fail to see how the rules of construction set forth in those cases can be followed in this case.

The case of *Van Horne v. Campbell*, 100 N. Y. 287, construes a will drawn before the enactment of the Revised Statutes and under the provisions of the common law.

The rule of construction as herein set forth has been changed by the Revised Statutes. 3 Revised Statutes (Banks' 7th ed.), 2178, is as follows:

"Section 32. No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate . . . by disseisin, forfeiture, surrender, merger or otherwise.

"Section 33. The last preceding section shall not be construed to prevent an expectant estate from being defeated in any manner, or by any act or means, which the party creating such estate shall, in the creation thereof, have provided for or authorized; nor shall an expectant estate, thus liable to be defeated, be on that ground adjudged void in its creation."

It seems to me that the estate intended to be created here, after the life estate of testator's widow, was a contingent future remainder, and, under the above provisions of the Revised Statutes, was such an estate as the testator had the right to create, and when the defeating contingency had been rendered impossible, to wit, the death of Mrs. Wyatt without having used any part of testator's personal property for her comfort, maintenance and support, then the remaindermen, representing the class mentioned in the fifth paragraph above, were entitled to possession.

It seems to me that it was clearly the intention of the testator to limit the use of the *corpus* of his personal property to the actual needs of his wife, and all doubts as to this view not being his intention is overcome by the third clause of testator's codicil, which is as follows: "I give, devise and bequeath to my dear wife, Mary Jane Wyatt, the sum of five hundred dollars (\$500)

absolutely for herself, her heirs and assigns forever, in addition to what I give her by my said will." This leads us naturally to ask, what had testator given his wife by his will?

Can there be any doubt as to what he supposed he had given her before this codicil was made, viz., the rents, issues and income of all his estate, real and personal, for her natural life, with the right to use the whole or any part of his personal property if she shall need it for her comfort, maintenance and support. If the testator had intended this bequest in his will to have been an absolute gift of all his personal property, what reason could he have had in attempting to give \$500 more than his whole personal estate, and from what source would the \$500 bequest in his codicil come?

While it is true that the widow is the one to determine primarily whether she needs any part of the *corpus* of this estate for her comfort, maintenance and support, yet I think that where a husband leaves his estate in this manner—practically under the control and enjoyment of his wife if her necessities require it—that to entitle the wife to the use of any part of the *corpus* of testator's personal property there must be something substantial in her needs; that the word "comfort" should not be construed to mean "luxury," or the words "maintenance and support" coupled with any possibility of doubt but what the circumstances of the beneficiary are such that a part of the fund or *corpus* of the estate is needed for that purpose. Such interpretation should only be given as the words in their ordinary meaning imply, the words "comfort, maintenance and support" meaning in each particular case that degree of comfort, maintenance or support which the testator in his lifetime bestowed upon his wife; and I think it incumbent on the part of the first beneficiary, whoever it may be, to show that the actual condition exists whereby the right to use, and thus lessen, the residuary estate may be exercised.

My conclusions, therefore, are: That this testator gave his wife the use and income of his estate, real and personal, for her

natural life, with the further right to use any part of his personal property, even to exhaustion, if she should need the same for her comfort, maintenance and support; that the balance of testator's personal property remaining at the death of his wife (and in this case the whole of it), subject to the expense of administration and the costs on this accounting, is to be distributed, under a decree to be entered herein in pursuance to the foregoing, to those entitled as residuary legatees under the fifth clause of testator's will, and hereinafter determined.

The portion of the fifth clause of testator's will, upon which a construction is asked, is as follows:

"Fifth. On the death of my wife, I give, devise and bequeath all the personal property of which I may die seized, not hereinbefore given or bequeathed, and including such part of my personal property as my dear wife shall not have used up for her necessities, to the children of my deceased brothers and sisters and the children of my dear wife's deceased sisters, equally share and share alike, so that each one of our said nephews and nieces shall take an equal share. . . ."

The words "including such part of my personal property as my dear wife shall not have used up for her necessities" settle beyond a doubt the construction the testator placed on the third paragraph of his will, and the estate he intended his wife to enjoy thereunder, and strengthens our belief in the third paragraph as above.

It appears by the testimony that at the time testator made his will he was survived by two sisters, five sisters-in-law and a large number of nephews and nieces, the children of two brothers and three sisters who were deceased. It also appears that there were other nephews and nieces, to wit, the children of testator's two living sisters, and the children of four of the living sisters of testator's wife; that the testator was well acquainted and on intimate terms with his living sisters and the sisters of his wife, and their families respectively. It is contended on the part of the nephews and nieces of the living sisters of testator's wife, that

inasmuch as the testator knew that all his wife's sisters were living, the word "deceased" in the sentence "the children of my dear wife's deceased sisters," should be stricken out as carrying a disposition contrary to the intention of testator, or else transposed and the sentence made to read, "the children of my dear (deceased) wife's sisters," and a like request is made that the word "deceased" in the sentence "to the children of my deceased brothers and sisters" be stricken out, or the words "and living" interposed, so that the sentence may read, "to the children of my deceased (and living) brothers and sisters."

The fact of making a will always raises a strong presumption against any wish of the testator to have his estate, or any part of it, enjoyed by those other than the ones named or included in a class mentioned and described in his will, and while it is the duty of the court to put such construction upon the various clauses of a will as will effectuate the general intent of the testator, and to that end transpose words and phrases, insert or leave out certain words or provisions if necessary, yet this can only be done in aid of the testator's intent, and not to make in whole or in part a new will.

If the testator had intended to include all his nephews and nieces, and his wife's nephews and nieces, in the class entitled to receive the residue of his personal property at the death of his wife, it seems to me that he would not have used the language he did, but would have prepared a simple sentence; one that could admit of no question as to his intention, and in substance, at least, as follows: Upon the death of my wife I give and bequeath all my personal estate remaining to my nephews and nieces and the nephews and nieces of my wife—or all our nephews and nieces—equally, share and share alike.

The testimony shows that this testator's will was drawn from a full memoranda of the various paragraphs, and that this part of paragraph fifth was in his own language, and it is fair to assume that he knew the meaning of the word "deceased," and how to use it in a sentence to express his wishes, and that if he

had intended a disposition other than the one expressed he possessed a sufficient degree of intelligence to have enabled him to do so; besides, six months thereafter he makes a codicil wherein he ratifies and confirms this fifth paragraph of his will. The sentence in the fifth paragraph above evidently intending to show the persons and to what extent they severally shall take, is particularly blind, viz., "so that each one of our said nephews and nieces shall take an equal share."

I cannot agree with counsel that the word "our" in that sentence should be considered as controlling and showing that the testator meant the children of his wife's sisters as well as the children of his own brothers and sisters. I think the word "said" is the significant word in that sentence, and refers specifically to the class that had been previously designated—our said nephews and nieces; that is, "the children of my deceased brothers and sisters and the children of my dear wife's deceased sisters." The testator could have used the word "our" in that connection even though there were no children of his wife's sisters, but in my view of his intention, as expressed in this paragraph of his will, the word "our" was used by him to show his intention that the children of his wife's deceased sisters (if any) were to be included at the time a final distribution was to be made.

From a careful examination of all the bequests in testator's will, it must be conceded that it was his intention to pass the enjoyment of his estate, after the death of his wife, to collaterals farther removed than his own sisters or his wife's sisters, and I think the general rule which has been declared in many cases, that where a legacy is given to a class of persons, distributable at a time subsequent to the death of the testator, all persons answering the description of the class at the time appointed for the distribution are deemed to be objects of the gift and entitled to a share, applies to this case. *Teed v. Morton*, 60 N. Y. 506, and cases cited. And this rule applies whether the legacy (if to be enjoyed in the future) is vested or contingent. A testator may

devote his gift to a whole class or restrict it to certain individuals of a class: to persons of a class living at his death, or to such persons and all others who belong to the class at the period of distribution. In this case the period of distribution was upon the death of testator's wife.

I am, therefore, of the opinion that the intention of the testator, as expressed in this fifth paragraph of his will, is as follows: Upon the death of his said wife the residue of his personal property, including such part as his wife had not used for her necessities, was to be divided among the children of his deceased brothers and sisters (except such as are named as not entitled to take), and the children of his wife's deceased sisters, if any. As all of testator's wife's sisters were living at the death of testator's wife, none of their children or the children of the two living sisters of testator, who also survived that event, are entitled to be considered in the class of nephews and nieces representing the objects of testator's bounty.

Two items in the account of the executor of Charles W. Wyatt, deceased, were objected to by counsel for the executors of Mrs. Wyatt's estate.

The item of twenty-one dollars and eighty-two cents for insurance upon the buildings on the real estate of testator, placed about four months before the death of Mrs. Wyatt, and the full premium for three years' charges against her, is objected to, and it seems to me properly so. While it is true that testator's wife had the benefit and use of this real estate for life, yet there is no reason for this beneficiary paying the premium for this insurance for the full period, unless she had lived to enjoy its protection, and the accounting executor should only charge the life beneficiary with a proportionate part of the amount of premium paid.

The item of twenty-five dollars and seventy-five cents paid by the accounting executor for the services of a trained nurse for testator's wife, and charged by said executor against her, I think is properly charged.

The fourth paragraph of the will is in part as follows:

"Fourth. On the death of my dear wife, I give, devise and bequeath the farm on which I now reside, consisting of about eighteen acres of land, with to my nephew Albert C. Wyatt, provided he shall board, care for and treat my dear wife as a son should treat a mother, caring for her comfort and doing for her as she shall reasonably desire." It appears from the testimony that the executor of Charles W. Wyatt's estate, learning that Mrs. Wyatt was sick, called, and although he found that everything was being done for her by this devisee and nephew that he could do, yet the executor aforesaid believed that the experience of a trained nurse was needed, and he accordingly sent one to care for her, and by the services of this trained nurse she was benefited temporarily.

While it is true that Mrs. Wyatt might have reasonably desired that this nephew obtain the services of a trained nurse, the testimony shows that it was the act of the executor of her husband's estate, who had funds in his hands belonging to her, and I fail to see, under the terms of testator's will, that it was incumbent on the part of this nephew to furnish a trained nurse, at least, unless she had desired it.

The request of the testator is that his nephew shall board, care for and treat his wife "as a son should treat a mother." The testator had no children, and he desired that his wife, after his decease, should have the care, protection and attention which a son gives a mother, and surely it is not customary for a son to furnish a doctor or trained nurse for a parent in sickness, unless probably where the circumstances of the mother are such that she could not pay for such services—a fact that did not exist in this case.

The item of twenty-five dollars and seventy-five cents will, therefore, be allowed as charged, and a decree entered in pursuance of the foregoing.

Decreed accordingly.

In the Matter of the Construction of the Will of PHILIP
MORGANSTERN, Deceased.

(Surrogate's Court, Westchester County, Filed June, 1894.)

SUBROGATES—CONSTRUCTION OF WILL.

On probate, a surrogate has no power to construe a will which embraces real and personal property so blended as to prevent a construction as to one species without involving the other.

On the probate of the will in this matter, the special guardian of three minor children of the testator, born after the making of his last will, asked for a construction of the will in so far as their interests were affected by that fact. There were also three children living at the date of the making of the will. The testator, after expressing his full confidence in the judgment and capacity of his wife for the management of property, of her love for their children, and that she would do the same full justice to them in the distribution of the estate as he would do, in view of these considerations, and his unbounded faith and trust in her and his love for her, he gave, devised and bequeathed to her, after some small legacies previously bequeathed, all the rest, residue and remainder of his estate, and he appointed her to be the general guardian of the persons and estates of such of his children as at the time of his death might be infants. The property so devised and given to his wife consisted of real and personal estate of the value of about \$70,000, the real estate being valued at about \$15,000 and the personal at about \$55,000.

J. N. Goldbacher, for executors; Farrington M. Thompson, special guardian.

COFFIN, S.—The facts that only three children were in existence at the making of the will, and that three were born subsequently, are conceded. It is, therefore, claimed by the special guardian that, under the provisions of 2 Revised Statutes, 65,

sec. 49, as amended by the Laws of 1869, chap. 22, that the father died intestate as to these after-born children. It is well settled that a testamentary disposition to a class includes every person answering the description at the testator's death. That is construed by the courts to be the testator's intention, and they are thus deemed to be mentioned. So, where a class is referred to, whether there is anything devised or bequeathed to them or not, all answering the description must be deemed to be mentioned. It is not considered necessary, however, to elaborate this point, as it will presently appear that this court has no jurisdiction to determine it in this case.

Section 2624 of the Code authorizes the surrogate, where a party expressly puts in issue the validity, construction or effect of any disposition of personal property contained in a will, to determine the question. He is not here required to determine an issue as to any clause of the will disposing of personal property solely, which he might do, but of one embracing both real and personal, and so inseparably connected and blended as to prevent a construction as to one species of property without involving the other. As the power to construe a will on the probate is one lately conferred upon the surrogate by statute, and is so far an enlargement of his jurisdiction, he cannot be permitted to go beyond it and attempt to exercise a larger power than was intended to be conferred by the legislature. *Matter of Shrader*, 63 Hun, 36.

The request to construe is, therefore, refused.

Ordered accordingly.

In the Matter of the Will of LAVINIA (DONKERSLEY) COBURN,
Deceased.

(*Surrogate's Court, Orange Conuty, Filed July, 1894.*)

1. WILL—VALIDITY.

The validity of a will is governed by the law of the testator's domicile at the time of his death.

2. SAME—REVOCATION.

An unmarried woman, while living in New Jersey, executed a will and subsequently married a resident of that State, with whom she thereafter removed to this State. *Held*, that the law of this State governed, and that her will was revoked by her marriage.

Proceedings for probate of will.

M. N. Kane, for proponent; W. D. Mills, for husband, contestant.

COLEMAN, S.—The testatrix on the 10th day of June, 1884, being at the time a resident of the State of New Jersey and an unmarried woman, made her will. On the 22d day of June, 1884, being still a resident of the State of New Jersey, she married Bartholomew Coburn, also a resident of that State, and they continued to reside in that State until the year 1889, when they removed to the town of Monroe, in the State of New York, where the testatrix died, without children, leaving her said husband her surviving. That will is now here offered for probate.

The husband objects upon the ground that, by the law of the State of New York, the will was revoked by the marriage of the testatrix subsequent to its execution. 2 R. S. 64, sec. 44. That statute reads as follows: "A will executed by an unmarried woman shall be deemed revoked by her subsequent marriage."

In answer the proponent urges: (1) That as the will was executed in the State of New Jersey by a resident of that State, and the subsequent marriage contracted in that State between residents thereof, the effect of the marriage upon the validity of the

will must be determined by the laws of that State; (2) that by the law of the State of New Jersey the subsequent marriage did not invalidate the will (*Webb v. Jones*, 36 N. J. Eq. 163), and (3) that the will not having been invalidated by the subsequent marriage it remained valid after the removal to this State, and should be admitted to probate. Sec. 2612, Code Civ. Proc. That section contains the following: "The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will."

Is the proponent correct in this position? Or does the law of this State work a revocation of all wills, wherever executed, of unmarried women who subsequently marry, so that they are invalid and cannot be admitted to probate in this State? This would seem to be the case, but I have been unable to find any case reported where this question has arisen.

Section 2612 does not go to the extent of declaring that the validity of a will is not affected by change of the testator's residence made since the execution of the will, but only says that the right to have the will admitted to probate, the execution thereof, or the validity or construction of any provision contained therein is not affected by such a change of residence. The preceding language of the section, "A will of personal property executed according to the laws of the testator's residence," etc., indicates that this right is not an unqualified right, but is a right which is given because the will has been executed in conformity with the laws of the State of the testator's residence at the time of its execution. I think it would not be claimed that this section gives the right to have a will admitted to probate which had been executed by a person fifteen years of age in the State where the laws of that State (if there was such a State) permitted such a person to make a valid will. Nor do I think it would allow a will to be admitted to probate where the testator had done an act,

wherever done, which, by the laws of this State, is declared to be revocation of the will.

The law of decedent's domicile at the time of death governs and gives effect, or otherwise, to his will. If Mrs. Coburn had died a resident of the State of New Jersey her will would have been admitted to probate there as valid, and undoubtedly such personal property as was in this State could have been administered according to the will under ancillary letters issued in this State. But it is not true that, having made her will in New Jersey while a resident there, her will should have the same effect now and here as it would have had if she had been resident there at the time of her death. The Case of Braithwaite, 19 Abb. N. C. 113; *In re Witter*, 15 N. Y. Supp. 133; *Trimble v. Dzieduzyiki*, 57 How. Pr. 208.

In the case of Braithwaite, 19 Abb. N. C. 113, the testator, being a resident of this State, duly executed his will at Rochester, bequeathing all his property to his children and grandchildren. He afterward married here and subsequently removed to the State of Maryland and died a resident of that State. The will was admitted to probate in the county of Monroe in this State. By the law of Maryland the widow of a man who dies leaving a will in which she is unprovided for takes one-third of his personal property after the payment of debts, etc. It was held that the will was revoked as to the one-third by the testator's removal to and death in the State of Maryland, his estate having thereby become subject to the law of that State. *In re Witter*, 15 N. Y. Supp. 133, is a case of very similar character. And in the case of *Trimble v. Dzieduzyiki*, 57 How. Pr. 208, it was held, upon the distribution in New York of the estate of a woman who had died domiciled in Italy, leaving a son born in Italy after the execution of her will there, that the son was entitled as "necessary heir" to one-half of the real and personal estate, notwithstanding that the property was held in the State of New York under a trust created by the testatrix in an antenuptial agreement in which the right to make a testamentary

disposition was reserved to her, and that she had executed a will by which all was given to her husband, executed, however, before the birth of the son.

The principles maintained in these cases go further than establishing the rule by which the domiciliary law governs the disposition of personalty; they also prove that this law overrides previously existing conditions by which a different result would have obtained.

A will is ambulatory not only in being subject to revocation and alteration, but in being incomplete and inchoate. Before rights can be acquired under it the testator must die, and at the time of his death the will must be valid under the laws then existing. *Moultrie v. Hunt*, 23 N. Y. 398. And this I suppose to be true whether a change in the law has occurred by legislation or by removal to another State where different laws exist.

I am of the opinion that this will was revoked by the subsequent marriage of the testatrix and should not, therefore, be admitted to probate.

Decreed accordingly.

Note.—A will made by a woman during coverture is not revoked by her second marriage. (*Matter of McLarney*, 90 Hun, 361; 153 N. Y. 416.)

In the Matter of the Estate of PAULINA McCLOUTH, Deceased.

(*Surrogate's Court, Cattaraugus County, Filed July, 1894.*)

1. LEGACY—PAYMENT.

Where the answer in a proceeding to compel payment of a legacy complies with the requirements of the statute and shows that the determination of the petitioner's rights will involve a construction of the will, the proceeding must be dismissed.

2. SURROGATE—JURISDICTION.

An independent proceeding for the construction of a will cannot be entertained.

Proceedings under sec. 2717 of the Code of Civil Procedure, to compel the payment of legacy.

W. K. Harrison, for petitioner; A. & G. E. Spring, for executor.

DAVIE, S.—On the 22d day of June, 1894, Lucinda Rogers, claiming to be a legatee under the will of deceased, filed her petition pursuant to the provisions of sec. 2717 of the Code, containing the usual averments, and on the return of the citation issued thereon the executor appeared and filed an answer, duly verified, denying absolutely that the petitioner was a legatee under such will, and alleging that by the terms of the will all the property of which the testatrix died possessed was devised and bequeathed to Charles D. McClouth, and that he was the absolute owner thereof, and that “the payment of the sum of five hundred dollars” (the amount claimed by the petitioner), “was left wholly to the discretion of the said McClouth, as such executor, and said executor denies that the discretion so vested in him can be modified, limited, suspended or interfered with in any manner;” then followed an allegation setting forth somewhat in detail the terms and provisions of the will and the facts tending to show that the petitioner had no absolute rights as a legatee, and thereupon the executor moved for a decree dismissing the petition pursuant to the requirements of sec. 2718 of the Code. This section provides that such a decree must be made “where the executor . . . files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner’s claim is valid and legal, and denying its validity or legality absolutely or on information and belief.”

The character of answer sufficient in form to deprive the surrogate of jurisdiction is quite clearly defined; denying the validity of the claim without alleging the facts is insufficient, (*In re Macaulay*, 94 N. Y. 574); so is an answer which alleges

the facts without denying the validity or legality of the claim. *Lambert v. Craft*, 98 N. Y. 343.

The answer filed in this proceeding meets both of these requirements; it denies absolutely that the petitioner is a legatee, and sets forth the facts upon which such allegation is predicated; and it appears from the facts alleged that the determination of the petitioner's rights will involve a construction of the provisions of the will. The jurisdiction of surrogates' courts is limited, and they are entitled to exercise such powers only as are conferred by statute or such as are necessarily incidental to the exercise of those powers expressly conferred (*Bevan v. Cooper*, 72 N. Y. 329; *Riggs v. Cragg*, 89 id. 479), and while they have authority to construe wills upon proceedings for judicial settlement as a necessary incident thereto, no jurisdiction exists for entertaining an independent proceeding for construction. In *Fiester v. Shepard*, 92 N. Y. 251, which was a proceeding instituted by one claiming to be a legatee for payment of legacy, the answer denied that, by the terms of the will, the petitioner became a legatee, and the court says: When the right of the claimant, which arises upon a debt against the estate or upon a legacy, is denied by the representative of the estate, the surrogate is prohibited by statute from hearing and deciding the issue thus raised, and the party is remitted to another proceeding or tribunal to establish and enforce his rights. To the same effect are *Charlick's Estate*, 11 Abb. N. C. 56; *Hulburt v. Durant*, 88 N. Y. 121; *Mumford v. Coddington*, 1 Dem. 27; *Smith v. Murray*, id. 34.

A decree will be accordingly made dismissing the petition in this proceeding, without prejudice to an action or accounting on behalf of petitioner.

Decreed accordingly.

In the Matter of the Judicial Settlement of the Accounts of
THEODORE TOMPKINS, as Surviving Executor of
JOHN PURDY, Deceased.

(Surrogate's Court, Westchester County, Filed July, 1894.)

LEGACIES—PAYMENT—COMMISSIONS.

Legacies which are directed to be paid out of converted real estate must be paid in full, without deducting for expenses of administration or commissions, where the other personal property is sufficient to pay all other legacies in full and such expenses and commissions.

The testator bequeathed all his household furniture to his widow. He then devised a certain parcel of land to his son, Stephen L. Purdy, and next provided as follows:

"Third. I order and direct my executors hereinafter named, within one year after the probate of this, my last will and testament, to sell or dispose of, either at public or private sale, the remainder of that piece or parcel of land, situate in Yorktown in said county, which was conveyed to me by Jacob Tompkins and wife by deed dated April 15, 1865. . . . Out of the proceeds of such sale I direct my executors to pay and discharge all my just debts and funeral expenses, and the surplus thereof I give and bequeath to my wife Eliza Ann, my son, Stephen L. Purdy, and my daughter Tamar Ann Bedell, in equal parts." By the next clause he gave, devised and bequeathed to his executors all the rest and residue of his real and personal property in trust for certain specified purposes. The above-named parcel of real estate was sold for \$1,500. The debts and funeral expenses paid therefrom amounted to \$180.58. The personal estate, other than the household furniture bequeathed to the widow, was abundantly sufficient to pay all of the expenses of administration, including commissions, but the executor claims that the \$1,500, less the \$108.58, should pay its proportional share of them.

D. W. Travis, for executor; Lent & Herrick, for James B. Arcularius, assignee of Tamar A. Bedell, legatee.

COFFIN, S.—A testator may, at his option, give land or the proceeds of the sale of land. Here his will converted the land into personalty one year from the time of his death, and the proceeds of the sale were given by him to his widow and two children, share and share alike, less the sum of his debts and funeral expenses. Thus he gave them residuary legacies. Deducting the amount of the debts and funeral expenses from the \$1,500, for which the land was sold, left a balance of \$1,319.42, each one's share being \$439.81. Thus it was, in effect, a legacy of that amount to each one. And legacies must be paid in full, without any deduction for expenses of administration or commissions, where there is other personal property sufficient to pay all other legacies in full, besides such expenses and commissions. Such is the well-settled rule. The executor, however, having sold the land and paid the debts and funeral expenses, will be entitled to his commissions on the proceeds of sale out of other funds of the estate, on paying the legacies mentioned to the parties entitled thereto.

Ordered accordingly.

In the Matter of the Will of LOUIS LANG, Deceased.

(*Surrogate's Court, New York County, Filed August, 1894.*)

1. **WILL—ACKNOWLEDGMENT.**

Presentation of the will to the witnesses with the signature in plain sight is a sufficient acknowledgment.

2. **SAME—TESTAMENTARY CAPACITY.**

Mistakes which are a result of a failure of memory incident to old age and which do not obscure testator's intention are insufficient to establish want of testamentary capacity where there is testimony of mental competency.

3. **SAME—INSANITY.**

A mistaken belief as to a relative's character is not insanity and will not avoid a will deliberately prepared and properly executed.

4. **SAME—ALTERATION.**

Alterations and erasures, made after execution, do not invalidate a will if testator's original intention can be ascertained.

5. **SAME—LEGATEES.**

A bequest cannot be held void for uncertainty as to the legatee where the person or corporation intended can be determined with reasonable certainty from the words used alone or in connection with extrinsic evidence.

6. **SAME—BEQUESTS—VALIDITY.**

The law of the legatee's domicile controls as to the validity of a bequest.

Probate of will.

Chambers & Boughton, for proponents; W. C. Morris (Douglas E. Levien of counsel), for contestants.

FITZGERALD, S.—The subscribing witnesses, Frederick H. Steinbrenner and Charles A. Appleton, testify to the facts essential to a due execution of a will. The paper is in the handwriting of the decedent, and was brought by him to the office of D. Appleton & Company, with which house the witnesses were connected, was presented to them with a statement that it was his will and the request that they sign it. He did not in their presence sign the paper, nor did he in expressed terms acknowledge

his signature. But its presentation to them with his signature in plain sight, as testified to by them, was a substantial acknowledgment. *Matter of Phillips*, 98 N. Y. 267.

Objections were filed in behalf of decedent's brother, Johann Nepomuck Lang, alleging that the execution was not a voluntary act of the decedent, and that he was not of sound mind and memory. No evidence of undue influence was produced. The only issue to be determined by me is the question of mental capacity, except that which arises on the validity of the instrument which is called in question on other grounds, and which I will hereafter consider.

Louis Lang was by birth a German, and was unmarried. He was an artist, and had resided for nearly fifty years in New York. By thrift he had accumulated a competence more than sufficient to supply his wants. His surplus moneys he deposited with Messrs. Appleton & Co., with some of the members of which house he was on terms of intimacy. Against the account he drew checks. Under the advice of Mr. William Appleton he made investments, and the securities were left with the firm for safe keeping. He was a member of the Artists' Fund Society and of the Century Club. In later years, by reason of increasing infirmities, he visited the club with less frequency. He became untidy in personal appearance, and his memory was somewhat impaired, a condition not uncommon in aged people, and at the age of eighty-one he died.

A competent testator, free from undue influence, may make whatever disposition of his property by will that he chooses, though unjust and unreasonable. He may divert his estate from those who would be regarded as having a natural claim upon his testamentary consideration, and give it to strangers. If capacity and formal execution and volition appear, the will must stand. *Seguine v. Seguine*, 4 Abb. Dec. 191. As concisely stated by *ROLLINS*, Surrogate, the question of capacity is whether a decedent is capable of sufficient thought, reflection and judgment to know of the property he has and to decide and declare what shall

be done with it. *Cornwall v. Riker*, 2 Dem. 354. And an unjust belief by a testatrix that her brother, the contestant of her will, had obtained more than a fair share of the property left by their father, to her detriment, and which caused her to have an intense dislike for the brother, was a mistake in judgment, and was no ground for rejecting her will. *Matter of Bull*, 6 Dem. 123. Even a monomaniac may make a valid will if the delusion has no relation to the subject or object of the will or the persons who would be likely, ordinarily, to be the recipients of his bounty, where the provisions of the will are entirely unconnected with or uninfluenced by the particular delusion. *Lathrop v. Board of Foreign Missions*, 67 Barb. 590. Nor is a lack of testamentary capacity to be assumed from the fact that one is far advanced in years. *Horn v. Pullman*, 72 N. Y. 269. In the light of these principles, I will consider the case on the evidence produced.

In 1889 or 1890—the date I will consider hereafter—Louis Lang himself wrote the paper now under consideration as his will. He also wrote another in the German language, purporting to be a will, and which in the paper itself he claimed expressed the meaning of the one in English.

He was conscious that he was near the end of life. He stated to Mr. Roelker, whom he named as one of the executors, that his bonds and valuables were in a tin box in the possession of Mr. Appleton. In the box were also found the will and the German copy. He explained to Roelker some of the provisions of the instrument, and gave him instructions, stating that his death might occur at any time. He told him where, in his apartment, other important papers were, that he might readily find them. He further stated to Mr. Roelker that Mr. Cunningham would attend to the details of his funeral. On a sheet of note paper with the caption “Last memoranda of Louis Lang to Patrick Cunningham,” whom he addresses as his friend, he gives instructions in respect to the disposition of his remains, to provide an inexpensive headstone for his grave and he designates Mr. Wil-

liam W. Appleton as his first and Mr. John L. Fitch his second executor. On a similar sheet, dated September 12th, 1891, he makes the same request, and asks Cunningham to see Mr. Fitch, his "second executor," who will send documents referring to his will to his native town, and will sell his pictures and other things in his room at auction for the benefit of the poor artists' widows. On October 17, 1892, he wrote to Mr. George W. Yewell, as "secretary of the Art Fund," stating that he had made his will, and in it made a disposition of everything in his apartments to be collected and prepared to be sold after his death for the benefit of the "Artists' Widows of the Art Fund established in the city of New York." On December 5, 1892, he wrote to Mr. Alfred Roelker a letter, in which he referred to his important papers and the necessity for Mr. Roelker to see where they were. Besides these documentary proofs, is the testimony of Mr. George H. Story and Mr. Yewell, who called on Lang in 1892, long after his will was executed, and of Messrs. Augustine Smith and Thomas W. Wood, who had had a long acquaintance with him, which continued to near the period of his death. From their testimony, and that of Mr. Roelker, there can be no doubt of the mental competency of the decedent.

Against this evidence are facts which appear upon the face of the will and other papers produced showing a tendency to decay of memory and of mental power. In the will, as in the two letters written to Cunningham, he refers to Mr. Fitch as one of his "executors," to whom he had intrusted the collection and disposal of his pictures for the benevolent fund of the Artists' Fund Society, though further on in the same instrument he states that "William W. Appleton and George H. Roelker had volunteered to be his executors." But "George H." is stricken out with the pen, and above in red ink is written the word "Alfred," but leaving on the next line "George H." as part of Mr. Roelker's name, with a statement that he is to conduct the correspondence in German. On the fifth page

he again writes the name "George H. Roelker." The residence of Mr. Roelker he states to be "202, 45 West street," instead of 202 West Forty-fifth street, where it is and has been for many years. No such person as George H. Roelker is known to Alfred Roelker. Besides, no one of that name resided in his house. The name of the society to be benefited by the proceeds of the sale of his effects is differently expressed, as "the Artists' Fund Society," and "the Benevolent Artists' Widows Fund" and "the Benevolent Fund." Interjected in the will, at the foot of the first page, in the paragraph giving instructions for the disposition of his effects, is written "Jewels I have none," and after the signatures of the subscribing witnesses at the end of the attestation clause, he has written the words "I am not a Chatolic, Louis Lang," doubtless a misspelling of the word Catholic, though it is in proof that he was reared in the Catholic faith. The date appears in the clause at the foot of the instrument as the 8th day of May, 1889, and immediately below, and above the signature, in Lang's handwriting, is written "May 8th, 1890." There is also an indorsement, written by himself, which reads, "Louis Lang's last will and testament. Original in English, May 8th, 1890." There is in the paper a profusion of exclamation points, which is also a feature in his letter. A portion of the will is written in the language of the law, as if drafted by an attorney. Other parts are colloquial in style, the words being such as a layman would be apt to use in the expression of his ideas. A direction to the executors to collect from the treasurer of the Artists' Fund his accrued interest of \$4,000, and add to it his assets, is crossed out in red ink, and opposite is written, "The amount has been paid *pro rata* to the members."

These anomalies, on careful examination, are accounted for. Some must have been the result of a failing memory, incident to old age. The fact of two different years—1889 and 1890,—being assigned to May 8th, as the date of the will, is explained

by a paper introduced in evidence, purporting to be a codicil, signed by the decedent and attested by the same witnesses, Steinbrenner and Appleton. This codicil is of a formal character, not in the handwriting of Lang, but evidently prepared by an attorney, probably Mr. Elial F. Hall, for many years a well-known lawyer practicing in this city, whose name appears in the indorsement. In the first clause it is stated to be a codicil to a will executed March 4th, 1889, several weeks before the date of the will, conceding it to have been executed in 1889. The true dates of the two papers are important to be considered, as bearing upon the question of the decedent's mental competency. The memories of the subscribing witnesses do not agree as to the order in which they were signed. Mr. Steinbrenner's recollection is that the will was the first executed. Mr. Appleton is confident that it was the codicil. They do both agree that there was a year between the two events. From the intrinsic evidence offered by the papers themselves, I am satisfied that Mr. Appleton's memory is correct, and that the date, May 8th, 1889, which occurs twice in the codicil—once in the witness clause and again written by the decedent himself above his signature—was when he copied the language of the codicil mechanically into the witness clause of the will, below which and above his signature he wrote the correct date, May 8th, 1890. As the codicil repeats and confirms the first seven sections of the will of March 4th, 1889 (which paper has not been found), and cancels the residue and substitutes provisions which, with marginal notes, were carried into the contested paper, no other conclusions can be reached but that the codicil was a codicil to a will of March 4th, 1889, and not to the paper under consideration. The language on the second page of the contested paper, in which he speaks of Mr. Fitch as his second executor, was doubtless without consideration copied from the will of March 4th, 1889, unmindful of the fact that he had determined to substitute Mr. Roelker, whom he named on the third page, though he gave his name inaccurately.

The claim that there was such a general impairment of mind as to suggest incompetency to make a will must be dismissed. It was only his memory that was at fault, but his mistakes did not obscure his testamentary intentions. They are apparent on a casual reading of the paper, and must determine the disposition of the property unless the will was the result of an insane delusion. The existence of such a delusion is claimed, but not in respect to his brother, the contestant, for to him he bequeathed 2,000 marks to enable him to pay his debts; nor to his brother's daughter, for he provides for her in the trust created by the paper, a life interest in 50,000 marks; nor in respect to his brother's son, Henry, whom he gives 2,000, if not 5,000 marks, to be paid in annual installments of 250 marks each; nor yet to the children of another niece, the first wife of Salzman, to each of whom he bequeathed 1,000 marks. The delusion is claimed to be in respect to the contestant's son, Hubert, who receives nothing in the will, and would receive nothing had Louis Lang died intestate. There is no declaration in the will or elsewhere that the passing of Hubert Lang without testamentary recognition was due, as is claimed, to a belief by the decedent that he had been robbed by Hubert, or that Hubert was a robber. There does not appear to have been any good reason for suspicion on the part of the decedent in respect to Hubert. At most it seems to have been a mistaken belief on his part in respect to Hubert's character, but such belief is not insanity, and cannot avoid a will deliberately prepared and properly executed. See *Clapp v. Fullerton*, 34 N. Y. 197.

Certain erasures and alterations which appear on the face of the paper are claimed by the contestant to have worked its revocation. The striking out of the "George H." as the Christian name of Mr. Roelker and the writing in of "Alfred" I have referred to. That change does not obscure the intention of the testator. It makes it certain. But he has changed the amount of a bequest to his nephew, Heinrich Lang, for 5,000 marks to 2,000 marks in the eleventh clause of the fifth page.

This is manifest from the fact that the 5,000 marks expressed in figures is left, followed by the words "two thousand marks," the two being manifestly written over an erasure, and further down in the same paragraph the word "two" is again written over an erasure followed by the words "thousand marks." These alterations, from their character, justify the presumption that they were made after the execution of the will. Such alterations will not invalidate the instrument, if the original intention of the testator can be ascertained. In this case the 5,000 in figures make it certain that it was "five" that was erased, and "two" written over the erasure. This question was fully examined by *ROLLINS*, surrogate, in *Wetmore v. Carey*, 5 Redfield, 544, which case is in some respects analogous to the one under consideration. In the will there, as it was originally written, was a bequest to each of two granddaughters of "five thousand dollars." On inspection it appeared that the word "five" had been altered to "two." There being no attestation of the alteration and neither witness having observed it at the time of execution, the surrogate held, upon a full examination of the authorities, that the alterations must be deemed to have been made after execution and consequently inoperative. Under the rule thus laid down, the bequest to Heinrich Lang of 5,000 marks as originally written must stand.

The only question remaining is whether the will is invalid upon other grounds set forth in the objections.

Little or no stress is laid by the counsel for the contestants on the question as to the identity of the legatee provided for in the second and third clauses of the will. The legacy is claimed by the Artists' Fund Society of the city of New York. The rule of law in this respect is concisely stated in *St. Luke's Home v. Association for Indigent Females*, 52 N. Y. 191: "A bequest would not be held void for uncertainty as to the legatee, except when it is found impossible, either from the words used alone or in connection with such extrinsic evidence as

would be competent to determine with reasonable certainty the person or corporation intended. It is well settled that an imperfect or inaccurate description of a person, natural or corporate, will not defeat a gift or grant." The evidence adduced in support of the claim of the Artists' Fund Society seems to establish beyond any reasonable doubt that the claimant was intended by the testator to receive the legacy.

The sole question remaining for the court to determine is as to the capacity of the council of Charitable Foundations in the city of Walldsee, kingdom of Wurtemberg, Germany, to take the residuary legacy. The law of the legatee's domicile controls as to the validity of the bequest, and the courts of this State will recognize a bequest which, if made to a legatee here, would be illegal, as valid when given to a legatee entitled to take under the laws of his domicile. *Estate of Beck*, Surr. Decs., 1892, page 16; *Chamberlain v. Chamberlain*, 43 N. Y. 432; *Matter of Huss*, 126 N. Y. 537; *Hope v. Brewer*, 136 N. Y. 126-139.

The evidence adduced on the trial as to the laws of the domicile of the intended legatee and of its ability thereunder to take by bequest, satisfies me that the legacy in question is valid.

Submit decree.

In the Matter of the Will of KATHERINE BACKES, Deceased.

(*Surrogate's Court, Erie County, Filed August, 1894.*)

WILL—BEQUEST FOR MASSES.

A direction in the will of a Roman Catholic that the executor cause masses to be said for testatrix and her deceased husband for any balance left after payment of debts and funeral expenses is valid, and authorizes the expenditure of a reasonable amount for that purpose.

Probate of will.

Frederick W. Ely, for petitioner ; George T. Hogg, for Jacob Backes ; Frederick G. Bagley, for Peter, Nicholas and Joseph Backes, Barbara Neuner and Margaret Beyer.

STERN, S.—Katherine Backes died in Buffalo, N. Y., on the 2d day of January, 1894, aged seventy years. She left surviving seven children, the youngest of whom is over thirty years of age. Prior to the making of her will she divided \$1,200 among her children. After making such division, she had left about \$250 cash. She made her will in August, 1891. It provides that her daughter Katherine should take the property, excepting her cash money. It directs her executors "to cause masses to be read in a German Catholic church in the city of Buffalo, for herself and her deceased husband, for any balance of cash money which might be left after the payment of her just debts, doctor bills and funeral expenses." The will further makes it known that prior to the execution thereof she had paid to each of her seven children \$171.40. All her children except Katherine object to the probate of the will. The evidence shows that all the formalities required by law were complied with, and that at the time of the execution of the instrument the testatrix was of sound mind, memory and understanding. The objections must, therefore, be overruled and the will admitted to probate.

In *Gilman v. McArdle*, 99 N. Y. 451, Judge RAPALLO says: "In this case the agreement was to expend the surplus, if any should remain after providing for the support of Mrs. Gilman and her husband, and their funeral expenses and monument, in procuring certain masses to be solemnized according to the ritual of the Roman Catholic church, of which they were members, a duty quite definite and easy of performance on payment of the customary charges. We concur with the court below in holding that there was nothing illegal in the purpose, nor can any person rightly complain that it involved any injustice. The money was her own. She disregarded no ties of kindred, for

she had none, and she undertook to devote her little accumulations to the benefit of herself and her aged husband so long as they might live, and so securing them a becoming burial, to be followed by those religious ceremonies which, according to their belief, were important."

In *Holland v. Alcock*, 108 N. Y. 329, the same judge says: "The efficacy of prayers for the dead is one of the doctrines of the Roman Catholic church, of which the testator was a member, and those professing that belief are entitled in law to the same respect and protection in their religious observances thereof as those of any other denomination. These observances cannot be condemned by any court, as matter of law, as superstitious, and the English statutes against superstitious uses can have no effect here. Const. U. S. Amendment, art. 1; Const. of N. Y., art. 1, sec. 3."

Judge CULLEN, in a case before him, reported in the N. Y. Daily Reg., January 29, 1886, and quoted in 40 Hun, 372, says: "I think a provision for masses for the benefit of the testator's soul is exactly akin to a provision for his funeral or monument. While decent burial is given by law out of even an insolvent's estate, I think the monument is no more an adjunct or concomitant of burial than the masses."

It would be useless to cite other authorities on this question; the views above expressed are ample and sufficient.

Had the testatrix died leaving only the \$250 cash to pay her debts, doctor's bills, funeral expenses and masses for the repose of her and her deceased husband's souls, it is not likely that her children would or could have made any objections, because the appropriation would have been in accordance with her station in life. But it now happens that, instead of the last-mentioned amount, she had \$900 cash. The intention of this was very plain. Having reached the age allotted to mankind, and being warned of approaching death, she divides her property among her children, retaining about \$250, enough in her judgment to

pay her debts and funeral expenses and to defray the charges for the solemnization of masses for herself, and remembering her husband, who has gone before her, she has the sacred rites of the church administered in his behalf. The intent of the testator is the rule of construction. Whenever the expressed intention can be ascertained the court must carry it into effect, provided it can be done without doing violence to some rule of law.

In *Emans v. Hickman*, 12 Hun, 425, the testator gave to his executor all his property, amounting to about \$1,200, for his funeral expenses and monument. The court, in construing the effect of this appropriation, held that the deceased did not intend to give all, but only such an amount to be expended for a monument as would be reasonable, and accordingly allowed \$150 for that purpose.

In *Matter of Boardman*, 46 St. Rep. 444, the testator provided that after the payment of his debts the balance of his real and personal property should be expended in the building and erecting of a monument, together with suitable fence and fixtures. The surrogate held the true construction to be that a reasonable amount should be expended for that purpose, and allowed \$500. It is fortunate that her property increased, otherwise the litigation of her children over her will would undoubtedly have swallowed up the money and the court would have been unable to carry out the intentions of the deceased, which are always more sacred than the wishes of the living.

The testatrix was a member of St. Mary's Roman Catholic church. She had a right to appropriate a reasonable amount of her money in offering masses for the remission of her and her deceased husband's sins. The direction to her executor to have the masses said in a German Catholic church in Buffalo is not indefinite. The deceased could not have intended any other than a German Roman Catholic church. There is no difficulty in carrying out the direction of the testatrix.

I decide that the direction contained in the will for the masses is valid. That the executor expend for masses the amount intended by the testatrix, which is the difference between the sum of \$250 and the amount of her debts and funeral expenses. The residue of her cash money, amounting to about \$650, must, after the payment of the necessary expenses of the administration of her estate, be distributed as though she died intestate.

Decreed accordingly.

In the Matter of the Will of AMANDA SANDERSON, Deceased.

(Surrogate's Court, Orleans County, Filed September, 1894.)

1. WILL—EXECUTION.

Facts sufficient to establish that testatrix signed and acknowledged her will in the presence of the witnesses.

2. SAME—SIGNATURE.

Where provisions relating to the sale and disposition of the estate intervene between the signature and the attestation clause, there is no signing at the end of the will.

3. SAME.

A paper containing disposing clauses cannot be made part of a valid will by a reference thereto in the will.

4. SAME—VALIDITY.

The fact that a valid will refers to a paper which cannot be identified does nullify the will.

Probate of will.

Whedon & Ryan, for proponent; Theodore L. Cross, for contestant.

SIGNOR, S.—The decedent left two papers, each in a separate envelope, sealed. On one envelope was written "Amanda Sanderson's Will, Shelby, Orleans County, New York." On

the other, "Amanda Sanderson's Will. I direct that this shall not be opened until after the death of my brother Stewart and my sister Harriett." Both indorsements were in the handwriting of the testatrix, but were not signed. In the first envelope was a paper giving the possession and use of all her estate to her brother and sister, and containing this provision, "and from and after the death of the longest lives of my said brother and sister, I give, devise and bequeath my said estate to persons named on another sheet, and inclosed in another envelope, which shall not be opened until after the death of my said brother and sister." This paper, as well as the other, purports to have been executed May 28, 1892, and this appears to have been executed in due form.

The other envelope contained a paper containing two small bequests, and gives the remainder to Charles Sanderson, names an executor, contains the usual attestation clause, and is signed by two witnesses, and is also signed by the testatrix with the usual attestation clause. Between the signature of the testatrix and the attestation clause of the two witnesses these words are inserted: "I direct my land shall be sold, including what I have heired, and the money securely sent to the foregoing bequests. I direct that my brother, Clinton Sanderson, shall take charge of my household effects, and I direct you to send one-half of the effects to Mrs. Nettie Tracy, of Madison, Madison county, New York. Take one-fourth for yourself, and the remaining one-fourth you may distribute to Sister Eleanor Barker's children and to Mrs. Mary S. Parker, as you deem it advisable." No mention is made of the other paper in this last one. It is also to be noticed that the first paper is written only on one side of each of the half sheets of a sheet of legal cap, so that between the final disposing clause of that paper and the clause appointing an executor there is an entire blank space of one page.

One witness swears: "Amanda told us she had a couple of papers she wanted us to sign; said that was her will; would like

to have us sign it; that was all that transpired that I can remember. Then Mr. Eckerson signed it first, and I signed after him. We both signed both papers. . . . We were both in the room when she said she wanted us to sign it. I think it was after we signed it that she said it was her will; I am not sure whether before or after; I know she said it; she told us to sign both of them. . . . I don't remember whether she signed her name there or not. The words '28th May' and 'ninety-two,' and the signature 'Amanda Sanderson' and the witnesses appear to be in the same ink and different from the rest of the will."

William Eckerson, the other witness, says she handed him the pen to sign his name and said it was not a very good one. "She pointed out the line where I should sign; I think that is all; my memory is not as good as it used to be; some things it bothers me to hear unless people talk very loud. I can't say whether she did or did not say it was her will. . . . She took the papers up and turned and sat at the desk; I did not see her sign them: I think she was folding them up. . . . I think to the best of my recollection she folded the papers without writing; I did not hear her say anything about there being a will; she might have said it and I did not hear her." On cross-examination he says: "I don't pretend that I can remember everything that was said. . . . She was not a loud-speaking person; I did not specially notice it enough to know whether there was any signature or not; I can't say that the signature was there or was not there."

It seems quite evident from the fact before referred to that the date, the name of the testatrix and the witnesses' names were all in the same kind of ink and different from the main body of the will, and that, as the witness remembers, she folded up the papers without signing, after they had signed, as well as her having the pen before they signed, her remark about the pen, and her statement, as remembered by the other witness, that it was her will, as well as her having written the attestation

clause, showing that she knew what was required, that she wrote her name with the same pen and ink at some time before the witnesses; so far as the signing in the presence of the witnesses and the acknowledgment of the will, I think those facts are established within the ruling in *Matter of Hunt*, 110 N. Y. 278.

The evidence in the case is simply that the witnesses do not remember whether the will was signed or not. One says he did not observe it enough to know whether the name was there, and the other does not remember whether it was signed in their presence or not. The attestation clause, written by the testatrix, states that it was done. It is conceded that the date, the name of the testatrix, and the names of the witnesses are with a different ink from the body of the will and are in the same ink. It also appears that she had the pen in her hand before they signed, and handed it to the witnesses to sign, remarking that it was not a very good pen, indicating that she had used it. Under these proofs, and with no proof or circumstance indicating that it was not signed and acknowledged in the presence of the witnesses, I think that it should be held that in these respects it was properly signed and acknowledged. The presumptions are in favor of such a conclusion. *In re Cottrell*, 95 N. Y. 329.

The case of *Matter of Mackay*, 110 N. Y. 611, differs from this that in that case the proof was positive that the testator did not sign in the presence of the witnesses, and that the paper was so folded that the signature could not be seen.

It is true, as laid down in several cases cited by contestant's counsel, that presumptions will not establish the execution when there is positive proof to the contrary, but such proof is here wanting.

The second paper is void as a will for the reason that it is not signed at the end thereof. After the signature follows the important provisions for a sale of her real estate, and the disposition of her household effects. *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Matter of Niles*, 13 St. Rep. 756.

Neither can this second paper stand as a part of the first. It

is not sufficiently identified as the paper referred to, nor can a paper containing disposing clauses be, in this way, made a part of a valid will. *Matter of O'Neil*, 91 N. Y. 516.

Whether a will with a blank space to the extent found in the first paper, between the disposing clauses and the clause appointing an executor, is signed "at the end thereof," has been several times discussed, but never judicially determined. *Matter of Heady's Will*, 15 Abb. N. S. 211; *McCord v. Lounsbury*, 5 Dem. 68.

This point was not urged in this case, and while it is a question of importance, and the practice one that should not be regarded with favor, leaving room, as it does, for gross frauds by inserting in the blank space disposing clauses not made by the testator or not properly authenticated, yet in this case, as the will is all in the handwriting of the testatrix, and was apparently all written at the same time, I do not think that the will should be refused probate for this reason.

Neither should the fact that there is a reference to a paper in the valid will which cannot be identified have the effect of nullifying the will. For these reasons the first paper may be admitted as a valid will and the second refused probate.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Accounts of
ALEXANDER TRAVER, as Executor, etc., of HENRY
MELIUS, Deceased.

(*Surrogate's Court, Rensselaer County, Filed September, 1894.*)

1. SURROGATES—OPENING DECREE.

A surrogate has power to open his decree on application of a party who was cited, but who was sick and unable to transact business at the time and who probably had no actual knowledge of the hearing.

2. WILL—LIFE TENANT.

A bequest to a widow of the use of a specified sum for life, with the right to use as much of the principal as she might require, gives her no vested right in the principal, and where she does not make any claim therefor during her life for her support, but expends her own money, her executor cannot recover the amount so expended by her.

This is an application to open the decree heretofore made in this matter by the surrogate of this county.

The application is made by the executor of the last will, etc., of Martha Melius, widow of Henry Melius, deceased, upon the following grounds:

1. An excusable default.
2. That the granting of the relief sought would be in furtherance of justice.

The will of Henry Melius, among other things, provides as follows:

"First. I give and bequeath to my wife Martha the sum of \$1,000, of which she is to receive the use during her natural life, and as much of the principal as she might require, and should any surplus remain, it is to be divided equally between my daughters."

The deceased left him surviving his widow, the said Martha Melius, and three adult daughters, children by a former marriage. Martha Melius died July, 1893, having survived her husband about three years.

At the time of his death, she was possessed of personal estate only, principally money, which, with a set-off allowed her from the estate of her husband, amounted to about \$1,400. She occupied without charge, by the consent of the devisee of her late husband, a dwelling house and lot containing eight acres of land down to September, 1892.

Her husband owed her at the time of his death about \$350, for which she held his note.

After the death of her husband she received the income from the \$1,000, set apart for her use, and whenever she required

more money she would apply to the executor of her husband for it, saying, "I will indorse it on the note," referring to the note of \$350 held by her against his estate, "as I do not wish to disturb the \$1,000," or words to that effect. This continued down to February, 1892, when she had a stroke of paralysis, after which she could not move without assistance, and was unable to transact business or even to speak.

Robert Bennett, the person with whom she resided, applied to the said executor after her attack for money for her use, and the executor paid the amount called for, and indorsed the same upon the aforesaid note, as she had formerly done, until the note was reduced to about \$130, when the executor paid the balance to Mr. Bennett and took up the note.

It is admitted that the widow used a portion of the principal of her own estate for her necessary support; also that a balance of unpaid interest upon the said \$1,000 was paid her executor after her death. Mrs. Melius, at the time of her death, left an estate of about \$700 only, the balance having been principally necessarily expended for her support.

C. Rockafeller, for Nicholas S. Miller, executor, etc., of Martha Melius, widow; John E. Hoag, for Alexander Traver, executor, etc., of Henry Melius.

LANSING, S.—Two questions are presented upon this application.

The first is a technical one, and relates to the opening of the decree.

The second involves the construction of the provisions of the will of Henry Melius, above set forth.

Technically, Martha Melius in her lifetime had her day in court. Both she and her personal representative are bound by the decree. She was duly and legally cited to attend the judicial settlement of the accounts of the executor of her late husband and failed to appear. She was not of unsound mind,

but it appears that she was sick and unable to transact business at the time she was cited, and probably had no actual knowledge of the hearing.

Under the circumstances of this case I have no doubt of my power, under subdivision 6, sec. 2481, of the Code of Civil Procedure, to open the decree.

It appears to be a case of excusable default.

"The surrogate has the power of a court of general jurisdiction to vacate his decrees, and relief may be granted as in the supreme court upon the application of any one for sufficient reason in furtherance of justice." *Matter of Flynn*, 136 N. Y. 287; *Matter of Tilden*, 98 N. Y. 434; *Matten of Filley*, 47 St. Rep. 428.

But a more serious question arises as to my duty to open this decree. This the law permits only for a sufficient reason and in furtherance of justice.

Undoubtedly if the petitioner show in addition to the excusable default of his testatrix that she has suffered manifest injustice in the decree herein, a case will be made to open it.

This brings me to the question of the construction of the said provision in the will in connection with the facts and circumstances of this case.

It is claimed by the petitioner that the widow, under the will of her deceased husband, was absolutely entitled to receive her necessary support from the principal of said sum of \$1,000 provided for her use, without reference to her own income or estate, and this whether she demanded it during her lifetime or not; that the right to have and enjoy it was a vested right; that it became vested whenever it appeared that she needed it for her support.

It was further insisted that since it appears that the widow was compelled to encroach upon the principal of her own estate for her support and maintenance, her personal representative is entitled to be paid an amount at least sufficient to make good the principal of her individual estate.

To this it was answered that the widow by her acts and declarations had in her lifetime manifested a clear intent to waive all right to the fund in question and that such waiver concluded her personal representative.

I am satisfied that this view is untenable. If the widow had an absolute or vested right to the fund, neither her failure to demand or receive it nor her alleged acts or declarations in waiver of her right would divest her or her personal representative of such interest.

But this application must be denied upon another ground. It involves an entire misapprehension, as I conceive, of the law governing the construction of the clause of the will in question.

Provisions in wills similar to the one in this case have been frequently before the court for construction.

It is well settled under the authorities that the widow took a life estate only in the sum of \$1,000, with the right to use such portion of the principal as she might require during her lifetime, and that the limitation over to the daughters of the testator is valid. *Colt v. Heard*, 10 Hun, 189; *Crozier v. Bray*, 120 N. Y. 366; *Wells v. Seeley*, 47 Hun, 109; *Smith v. Van Ostrand*, 64 N. Y. 278.

It follows that the widow had a right to the income from the sum in question absolutely, but the right to the principal depended upon the condition that she should apply it to her use, or at least demand it for that purpose, during her lifetime; failing this, immediately upon her death the limitation over took effect and the daughters of the testator became entitled to the unexpended principal.

In the view which I have taken I do not deem it important to decide the question (much discussed upon the argument) whether the word "require" in the clause in question should be held to mean "demand" or "need," for I do not think the testator used the word in a technical sense.

If the ordinary support of the widow, in her judgment, required the use of the money, she was entitled to use it for that

purpose; whether that was the extent of her right it is unnecessary to decide here, but her right to dispose of it was unquestionably limited to her lifetime.

Doubtless a demand upon the executor in some form was required (it having remained in his possession) in order to perfect the widow's right to the fund and avoid the limitation over. Perhaps when that right once became perfected by a demand by the widow and a wrongful refusal by the executor, it would survive to her executor, but it is not necessary to decide that question. for concededly she did not demand it during her lifetime.

Manifestly, under the authorities, the widow had no vested right or interest in any portion of the principal; therefore, no portion of it passed under her will, nor had she perfected, or sought to perfect, her claim to the principal or any portion of it so as to create a right of action which survived her.

It, therefore, follows that the petitioner's claim, which is based upon the assumption that his testatrix had an interest in said principal sum which survived her death, is utterly untenable.

The cases of *Holden v. Strong*, 116 N. Y. 471; *Estate of James Riley*, 4 Misc. Rep. 338; *Matter of Dickerman*, 34 Hun, 585, which the petitioner cites, furnish no support for his contention.

In the case of *Holden v. Strong*, the trustee was given full power and authority to use so much of the trust estate, either principal or interest, as shall in "the judgment and discretion" of said trustee "be necessary for the proper care, comfort and maintenance" of said beneficiary during his life.

The court held, construing this provision, that neither the fact that the beneficiary was able to support himself by his own exertions, or that he was frugal and saving and had accumulated a fund in the bank, would deprive him of the right to the support provided for him.

The other cases are to the same effect.

These cases simply illustrate the liberality of the courts in enforcing provisions made for the support of beneficiaries who demanded or required the benefits of the same during their lifetime, but do not furnish the slightest support to the petitioner's contention that provision made for the support of a beneficiary, but not claimed or demanded by him in his lifetime, can be recovered by his personal representative where there is a valid limitation over, in the case of his death.

Application denied, with costs.

In the Matter of the Estate of THOMAS BEYEA, Deceased.

(Surrogate's Court, Orange County, Filed November, 1894.)

1. EXECUTORS—ACCOUNTING—LIMITATION.

An executor or administrator may be compelled to account although more than seven and a half years has expired since his appointment.

2. SAME.

One who has been appointed receiver of a legatee in proceedings supplementary to execution against the latter may require an accounting by the executor.

3. LIFE TENANT—RIGHT TO POSSESSION.

A life tenant is only entitled to possession of such of the personal property as can only be used by having possession, and not to the custody of money and securities.

Application by a receiver to compel an executor to account.

Dill & Cox and W. Vanamee, for petitioner; J. C. R. Taylor, for executor.

COLEMAN, S.—An application by a receiver in supplementary proceedings to compel an executor to account. The testator died August 21, 1877, and letters testamentary were granted Sep-

tember 14, 1877, to Samuel and Nathaniel Beyea. By his will the testator gave to his widow "all his real estate, goods, chattels, and notes, money, and all other personal property, . . . to hold the same during her natural life," and, at her death, he gave to his four children (said executors being two of them) equally all his "real estate, goods, chattels, notes, money, and all other property which I shall have at the time of my death, or the death of my wife." The testator's wife survived him, and died in February, 1894. The petitioner was appointed receiver, etc., of the son, Samuel Beyea, September 28, 1877. It was decided in *Re Van Dyke*, 44 Hun, 394, that an administrator with the will annexed could not be compelled by the surrogate's court to render an account after 7 1-2 years from the date of his appointment, because of the statute of limitations; and the law as there decided was afterwards followed by the surrogate of Westchester in the case of an executor (*In re Dunham's Estate*, 1 Con. 323), and by the surrogate of New York in the case of an administrator (*In re Clayton's Estate*, 1 Con. 444). But afterwards, in *Re Camp*, 126 N. Y. 377, the Court of Appeals decided that a general guardian could be compelled to render an account 16 years after his ward became of age, because the fund received by him as guardian was the property of another confided to his care; and in that sense he occupied the position of a trustee, so as to prevent the running of the statute of limitations, even if it was not a "trust," in the usual legal sense of the term. There are some distinctions between the nature and duties of the office of an executor and an administrator and those of a general guardian, but I doubt if they be of such a character as to place them outside of the application of the decision in *Re Camp*, when so broad a character, as to their duties to account, is given such officers. Executors and administrators are appointed to take the custody and care of the property of others, impressed with certain duties and trusts, which they must discharge in order to be relieved, either by their actual per-

formance or by the presumption of their having been performed; and it would seem that this presumption will not arise until such duties have been openly repudiated for the statutory period, and does not by the expiration of the statutory period after the time fixed for them to account. *In re Grandin*, 40 St. Rep. 655; *In re Camp*, *supra*.

It is claimed on behalf of the executors that they should not be required to give an account of the personal property, because the will gave the widow the right to hold it during her life, and there is no proof that any part of it has since her death come into their hands. This is not tenable, because the widow was only entitled to the possession of such of the personal property as could only be used by having the possession, and possibly even such should have been converted. The executor should, however, have retained the custody of moneys and securities, and only paid over the income. A receiver in supplementary proceedings of a judgment debtor legatee may require an accounting by an executor. *In re Rainey's Estate*, 5 Misc. Rep. 367.

An order will therefore be made requiring the debtor Samuel G. Beyea (he being the only one served) to render an account.

Ordered accordingly.

In the Matter of the Probate of the Will of ERNST AUGUST
RAUPP, Deceased.

(*Surrogate's Court, Kings County, Filed November, 1894.*)

WILL—MUTUAL.

Two or more persons can execute valid separate wills, although contained in the same instrument, provided that all the requisites of the statute are complied with by each.

Proceedings for the probate of the will.

Frank N. O'Brien, for proponent; Fernando Sollinger, for contestants.

ABBOTT, S.—On January 8, 1894, Ernst August Raupp and Louisa Raupp signed a paper, of which the following is a copy:

"We, Ernst August Raupp and Louisa Raupp hereby certify that it is our joint wish and will: (1) That after the death of the survivor of either of us, no one has a right to take anything of our household furniture except Mrs. Elizabeth Christie, as we hereby give to her (E. Christie) as a present all movables; (2) that all moneys, after deducting all debts and expenses, are also given to Mrs. Elizabeth Christie for nursing during our illnesses. Witnesseth by our signatures this January 8th, one thousand eight hundred and ninety-four.

"ERNST AUGUST RAUPP.

"LOUISA RAUPP.

"Witness to signatures:

"ERNST L. WENZ.

"CHARLES L. VOLK."

Ernst and Louisa were husband and wife, both very ill and feeble, and evidently in expectation of dying. As a matter of fact, both did soon thereafter die, Louisa on the 8th of March, 1894, and Ernst on the 16th of March, just eight days after his wife. The aggregate value of the personal property of both Ernst and Louisa is about \$2,350. They left surviving no child or descendants, and as their nearest of kin a brother of the husband and a sister and a half-brother of the wife. The instrument in question has already been admitted to probate as the last will and testament of Louisa Raupp, and is now offered for probate as the last will and testament of Ernst A. Raupp. It is not disputed that all of the requisites prescribed by the stat-

utes in relation to the execution of wills were complied with by both Louisa and Ernst. It is, however, contended, in behalf of the next of kin of Ernst, that the will is a "joint" will, and has no legal status under the laws of this State. Counsel for the contestant concedes that "mutual" wills are valid in the State, under the authority of *In re Diez*, 50 N. Y. 88. I do not think the use of the word "joint," in the opening sentence of the will, in any respect alters the signification and effect of the provisions which follow that sentence. The contents of the instrument must control. Even in the instrument which was under consideration in the Diez matter, *supra*, the first clause recited that "we have made as yet no conjoint disposition of any kind," etc. Therefore the mere use of the word "joint" is utterly immaterial, and of no consequence to the question at issue. In the instrument under consideration there is no question of mutuality, nor of contract between the signers of the instrument. These have been the considerations which have made difficult the determination of the effect of the other instruments which have come before the courts. In the case at bar the sole question to be decided is, can two or more persons execute valid separate wills and testaments when contained in the same instrument? I am of the opinion that, if the requisites of the statute are complied with by both signers, such an instrument is the valid will of each.

RAPALLO, J., in the Diez case, *supra*, at page 94, says:

"Here, the husband having died first, it can be proved as his will, and the efficacy of his dispositions is no way impaired by those portions of the instrument which, if the wife had died first, would have constituted her will, but which have now become inoperative. The result is precisely the same as if like reciprocal dispositions had been made by the husband and wife by means of two separate instruments. The combining of such reciprocal dispositions in one instrument is sanctioned by several authorities. *Ex parte Day*, 1 Bradf. 476; *Lewis v. Scofield*, 26 Conn. 452; *Evans v. Smith*, 28 Ga. 98; 1 Redf. Wills,

182; *Roger's Appellants*, 11 Me. 303; *In re Goods of Stracey*, L. Deane Eccl. R. 6; *In re Goods of Lovegrove*, 2 Swab. & Tr. 453; *Dufour v. Pereira*, 1 Dick. 419; 2 Hargrave, 310, 311."

The provisions of the instrument which would have constituted the wife's will, had she died first, would only become operative because the sole legatee was dead. Not so in the case at bar. Applying the test suggested in the *Diez* case, the provisions of the instrument would have been entirely valid and proper if written on separate pieces of paper, and such provisions are not at all difficult of construction. The payment of the legacy to the sole legatee is postponed until after the death of the survivor. In case of both husband and wife, under the circumstances of this case, the survivor would have been entitled to the entire personal estate in case of the intestacy of either. It was therefore entirely reasonable and proper to make provision for the disposition of the property, to take effect only after the death of the survivor.

I am unable to find anything in the terms of this will which would have prevented either Ernst or Louisa from changing the testamentary disposition of the property either before or after the death of either. It is true that the will can take effect only on the death of the testator. In this case it takes effect as to the property of each upon and not until his or her death. Among other authorities cited with approval by Judge RAPALLO in the *Diez* case, *supra*, is *Matter of Day*, 1 Bradf. 476. In the course of his very learned and exhaustive opinion in that case, Surrogate BRADFORD says, at pages 483, 484:

"Nor do I see anything in the formal requisites prescribed by our statutes in relation to the due execution of wills militating against the admission of a mutual will to probate, from the mere fact that it was executed as a will by two persons at the same time, provided that all the proper solemnities were duly performed. The subscription at the end of the will, the declaration of its testamentary character, and the attestation by two witnesses, if proved, are none the less true of each of the testa-

tors because true of both. If the instrument be propounded as the will of one, the signature and declaration of the other may be regarded as mere surplusage, so far as the probate court is concerned."

See, also, Beach on Law of Wills, 89, 92.

I am of the opinion that the instrument now offered for probate should be admitted as the last will and testament of Ernst A. Raupp.

Decreed accordingly.

In the Matter of the Probate of the Will of CATHARINE GRAF,
Deceased.

(*Surrogate's Court, Westchester County, Filed November, 1894.*)

WILL—FRAUD.

Where, at the time of execution the testatrix was in *extremis* and could only answer questions by a nod, and upon application for immediate probate one of the legatees was represented by a stranger and the names of infant legatees suppressed, *held*, that the facts were so suspicious that probate should be refused.

Application for the probate of the alleged will of Catharine Graf, deceased.

W. S. Allerton, for proponent; Appell & Tompkins, for contestant; Hiram Paulding, for special guardian.

CORPIN, S.—The alleged will of the deceased was written and executed four or five hours before her death. Her death was a result of apoplexy. At the time of the execution of the alleged will she was in *extremis mortis*. Her tongue and right side were paralyzed. She was in bed, and could not speak or articulate.

She was a German, and the person who drew the will did not understand the German language, nor she English; and, in order to obtain instructions for the preparation of the paper, another German woman, Mrs. Helwig, who and whose infant children were to become beneficiaries therein, professed to ask the sick woman, in her native language, if she wished to dispose of her property thus and so, and she would answer by a nod, and then Mrs. Helwig would repeat it in English to the scrivener, who wrote accordingly. The alleged will so prepared purports to give the whole estate to Mrs. Helwig for life, subject to the payment of debts and a legacy of \$150 to Frederika Mack, with remainder to Mrs. Helwig's children. Soon after the death of Mrs. Graf the executor named in the paper propounded, a Mr. Stillwell, his lawyer, and the legatee Mrs. Mary Helwig, and a female represented to be Frederika Mack, in order to escape a contest, as alleged, went at once to the court to obtain immediate probate of the paper; the petition stating the value of the real and personal estate to be \$2,500, and also who were the legatees, but omitting to state the names of the infant children. The female accompanying them signed the name of "Frederika Mack" to a waiver of citation and consent to the immediate probate, and was introduced by Mr. and Mrs. Helwig to the notary, who was also the proponent's lawyer, by that name, and he certified to her acknowledgment. This female, it is shown, was not Mrs. Mack, but personated her by the procurement of the persons concerned or some of them. On the same day letters testamentary were issued to Barnett Woodard, the executor named, and he at once, and on the same day, drew out of a bank at Mount Vernon money of the estate, and paid the lawyer for his services in the matter about \$150. Who instigated this fraud upon the court it may not be very material to inquire, but it is certain that Mr. and Mrs. Helwig were parties to it. Nor if Mrs. Mack were present can it be discovered why any contest could be feared, unless it were based upon the consciousness of some wrongdoing in the premises. A Mrs. Ehrbar, who was

an old and intimate friend of the deceased, and who or whose children had been made beneficiaries under a former will, was not permitted to see the dying woman except in the presence of Mr. and Mrs. Helwig. Other facts were developed by the testimony upon which it is deemed unnecessary to comment. It was discovered by the clerk of this court, on the same day, that the infant children named in the alleged will as beneficiaries, and not named in the petition as such, had not been cited, and he at once wrote to the executor to return the letters, which was subsequently done, but not until after the money was drawn from the bank. This proceeding was then instituted, Mrs. Mack and the infant children cited, and a special guardian for the latter appointed. Mrs. Mack, who is the legatee to the extent of \$150 in the alleged will, had been a beneficiary to a larger amount in a former will, and contests the present one, professing to be able to establish the former.

Swinburne, in commenting upon the assent of a testator in a case like this, says in quaint language:

"It is to be presumed that he did answer, 'Yes,' rather to deliver himself from the importunity of the defendant than upon devotion or intent to make his will; because it is for the most part grievous to those that be in that extremity to speak or be demanded any question, and therefore are ready to answer any question, almost, that they may be quiet; which advantage crafty and covetous persons, knowing very well, are then most busy, and do labor with both tooth and nail to procure the sick person to yield to their demands, when they perceive he cannot easily resist them, neither hath time to revoke the same afterward, being then passing to another world. And therefore worthily and with great equity is that to be deemed for no testament when the sick person answereth, 'Yea,' the interrogation being made by a suspected person, as well as in respect of presumption of deceit in the one as of defect of meaning of making a testament in the other. And this is true especially when there is a former testament." Swinb. Wills, pt. 2, sec. 25.

These sound and just observations apply with great and conclusive force to this case, and the facts attending the making of the alleged will, and the subsequent suspicious and fraudulent transactions, leave no doubt that it is my plain duty to refuse probate of the paper in question, with costs against the propo-
nent out of any funds of the estate under his control.

Decreed accordingly. An order should be entered revoking the letters issued on the fraudulent probate.

**In the Matter of the Judicial Settlement of the Accounts of
JOHN J. S. MANSFIELD et al., as Executors, etc.,
of ELIZABETH F. STORM, Deceased.**

(Surrogate's Court, Westchester County, Filed November, 1894.)

1. EXECUTORS—PAYMENT OF DEBTS.

Although there is an equitable conversion of the realty, no part of the proceeds can be used for the payment of debts so long as there is sufficient personalty for that purpose.

2. SAME—TAXES.

Taxes which were fixed at testator's death constitute a debt and are payable from the personalty.

3. SAME.

A direction in the will that insurance and repairs shall be paid out of the rents of realty which is directed to be sold does not indicate an intention that taxes accruing after testator's death should be paid from the personalty.

4. SAME—COMMISSIONS.

Where the realty is left to one class of persons and the personalty to another class, and each fund is administered by one of the executors, who render separate accounts, each class must bear the expenses of the accounting as to the fund in which it is interested and each executor is entitled to commissions on the fund he represents.

Judicial settlement of the accounts of executors.

The testatrix, by her will, directed her executors to erect to her memory a certain style of tombstone or monument, and charged the expense to her personal estate. All the rest of her personal estate she bequeathed to her nephew and niece, John J. S. Mansfield and Elizabeth F. Mansfield. She then provided as follows: "I order and direct my executors to sell all my real estate at such times and in such manner as they shall deem most advantageous to my estate, and to make, execute and deliver to the purchaser and purchasers thereof good and sufficient deed and deeds of conveyance for the same, and to divide and distribute the proceeds of such sales" among persons other than said Mansfields, and then directed that until such sale be made the executors rent the same, and out of the rents received pay insurance and repairs and distribute the residue among those to whom the proceeds of sale were given. The real estate was sold for \$25,000 since this proceeding was commenced, and a supplemental account was filed showing that the income from it as rents was about \$782.33. The taxes paid amounted to \$495.87. The expenses attending the management and sale of the real estate amount to \$861.65. These several amounts are claimed by executor Storm as chargeable against the personal estate, which aggregated about \$27,000. Executor Mansfield objects that they are not so chargeable. The latter also claims that taxes amounting to \$124.50 and paid by him should be paid out of the proceeds of the sale of the real estate. To this the executor Storm objects.

M. G. Hart, for executor John I. Storm; Remson & Parsons, for executor John J. S. Mansfield.

Coffin, S.—The executors have filed separate accounts, it being alleged that Mr. Storm had sole charge of the real estate and Mansfield of the personal. The debts, etc., were directed to be paid out of the personal estate, and, if the taxes paid by Mansfield were fixed at the death of the testatrix, then they were a debt the payment of which was devolved upon the personal es-

tate by law. The will was admitted to probate in May, 1892, and these taxes were paid in June following, from which it may be fairly inferred that they were due at the testatrix's death. In another phase of this matter before me it was intimated that, although there was an equitable conversion of the real estate into legal assets, no part of the proceeds could be applied to the payment of debts, so long as the personalty, of which the testatrix died possessed, was sufficient for that purpose, and it is now so held. It is claimed that the taxes on the real estate, accruing since the death of the testatrix, should also be deemed a charge upon the personal estate. The claim is urged mainly upon the ground that the testatrix directed that the insurance and repairs were to be paid out of the rents of the realty, saying nothing about the taxes, and that, therefore, she intended that they should be paid out of the personalty. It may have been a mere omission, or she might have anticipated a sale before the accruing of any taxes. Suppose she had, instead, omitted the word "repairs," or have omitted also "insurance and repairs," could it be justly claimed that all these items should be paid by persons who had no interest in real estate whatever? There was no period fixed when the realty should be sold, and it may have remained unconverted for years to come, and, if the personalty were liable for taxes to the end, then there could have been no accounting and final distribution of it until such sale. It is clearly equitable that the taxes should be charged against the proceeds of sale of the realty; and it seems equally clear that the expenses of such sale should also be so charged. As the testatrix separated her estate into two parts, bequeathing her personalty to one class of persons, and disposing of her realty to another class, and as one executor has solely administered the former, and the other the latter, and as they render separate accounts of each respectively, each class shall bear the expenses of the accounting in regard to the fund in which it is interested, and the executors shall have commissions on the fund each represents.

Decreed accordingly.

In the Matter of the Estate of BERNARD TRAVIS, Deceased.

(*Surrogate's Court, Westchester County, Filed November, 1894.*)

LEGACY—PAYMENT.

Where there is an equitable conversion of the realty and there has been a delay in its sale, the surrogate may direct the payment of a legacy where the entire estate is sufficient to pay all debts and legacies which are entitled to priority or equality of payment.

Application by the general guardian of infant legatees for payment of interest on the legacies.

The deceased left a last will and testament, disposing of an estate estimated to be of the value of \$40,000. On the real estate were mortgages to the amount of \$12,800. He directed his executors, among whom was Edward M. L. Ehlers, to sell his real estate, and out of the proceeds to pay to Estella Travis a legacy of \$12,000, to Margaret Travis \$5,000, and to Augusta, Le Roy and Robert Travis, infant grandchildren of testator, \$1,000 each, to be invested, the income of which was to belong to said infants, or to be applied to their support. A judgment has been obtained against the executors for about \$5,000, an appeal from which has been taken and is still pending. The real estate lay in and about Katonah, and since the probate of the will the title to a portion of it has vested in the city of New York for water purposes, the value of which has not yet been determined, but proceedings to that end are pending. Charles E. Travis, the general guardian of the infants, now makes application for an order directing the executors to pay the interest on the legacies so bequeathed to them.

Pratt & Thompson, for petitioner; Joseph C. Crane, opposed.

COFFIN, S.—It is well settled that a surrogate has no power, in a case like this, to compel the executors to sell the real estate;

but he may, in a proper case, decree payment of a legacy, and thus, perhaps, indirectly and legitimately, coerce a sale, where the strictly personal property is insufficient for the purpose. The legacies in question are due, and the legatees are entitled to them; and the decree prayed for should be granted, if there is "money or other personal property" which may be so applied without seriously affecting the rights of others entitled to priority or equality of payment. There can be no doubt that the will of the testator effected an equitable conversion of his land into money (Gilb. Lex. Pr. 243), and it must be treated as money. See, also, 2 Story Eq. Jur. p. 98, sec. 790. It seems to be conceded that the estate is of the value of \$40,000, all of which must be treated as money in the hands of the executors, while the amount of debts and legacies is about \$38,000, thus demonstrating that the decree for payment may be granted without seriously affecting the rights of any others interested in the estate. These grandchildren are minors, and justice requires that they should be paid. A portion of the real estate was not taken by the city of New York, and still remains unsold by the executors. Precisely when the city became the owner of the other portion does not appear, but my impression is that a considerable period intervened between the time when the executors assumed the duties of their trust and the obtaining of the title by the city, during which the whole of the realty might have been sold. However this may be, the legacies should be paid.

Decreed accordingly.

NOTE.—Affirmed, 85 Hun, 420.

In the Matter of the Estate of CHARLOTTE S. EDDY, Deceased.

(Surrogate's Court, Rensselaer County, Filed November, 1894.)

1. ADMINISTRATOR—TEMPORARY.

A temporary administrator should be appointed where probate is delayed by a contest and the estate consists largely of unsecured notes.

2. SAME.

Where there are conflicting interests, a person interested in the estate should not be appointed administrator.

Application for the appointment of a temporary administrator pending the contest of a will.

W. W. Morrill, J. A. Cipperly and F. S. Black, for petitioner; Warren, Patterson & Faulkner and T. S. Fagan, for the executors.

LANSING, S.—This is an application for the appointment of a temporary administrator upon the ground that the necessary delay in this case in the granting of letters testamentary arising from the contest of the will requires the exercise of such power of appointment by the surrogate. The Code provides for the appointment of a temporary administrator "where delay necessarily occurs in the granting of letters testamentary or letters of administration in consequence of a contest;" and it may be granted "on the application of a person interested in the estate." Code, sec. 2670. Of course, it is not every case of delay that will warrant the exercise of the power of appointment. There is necessary delay in every case of contest, and yet the condition of an estate may be such that it would be manifest that no possible harm or inconvenience could result from the delay to the parties interested. The question, then, arises, is there anything in the character or condition of this estate that the necessary delay in granting letters (or having some person authorized to

take charge of the estate) will necessarily or probably cause loss to the estate or be likely to impair the rights or remedies of the persons interested therein? If so, a case has been made for the appointment of a temporary administrator. I do not deem it necessary to do much more than to state my conclusions in this case. Under the will, which provides that the executors shall sell the real estate, which consists of a dwelling-house of the value of from \$10,000 to \$12,000, and divide the proceeds between her three children, William B. and Charles G. Eddy and Mrs. J. A. Cipperly, as I understand the law, the three children take title to the real estate as tenants in common. *Post v. Benchley*, 43 Hun, 87; 1 Rev. St. p. 729, sec. 59. And the same result follows when the power of sale operates as an equitable conversion of land into personalty. *Lent v. Howard*, 89 N. Y. 169. In either case the rents and profits intermediate the seizin and sale belong to the heirs. *Id.* It is also well settled that when one tenant in common occupies the premises he is not liable to his cotenant for the value of its use. *Rich v. Rich*, 50 Hun, 199. I may further add I do not think that a continued occupation of the premises by one tenant in common, which was commenced under a lease from the ancestor, and terminated shortly after her death, could be treated as a holding over by the occupant as tenant of the remaining heirs upon the same terms as before. I am very clear that, as soon as the descent was cast, the tenant was in under his own title as heir or owner.

But it is answered, assuming all this to be true, the tenant in common in occupation of the premises is willing to waive his right as owner, and to stipulate to pay rent as tenant under his former lease. But the proposed stipulation is hardly broad enough under the facts, since it is claimed by the applicant that the tenant has extended his occupation to other rooms of the house (which is or may be adapted for use of two families), so that practically his occupation amounts to an occupation of the entire premises, while the stipulation to pay rent only covers one tenement or portion of the house. But if it may be assumed

that the rights and interests of all the parties could and possibly would be (if this application were denied) protected by a stipulation (a result, considering the present temper of the parties, I consider extremely unlikely), there is still another, and it seems to me a controlling, reason why the application should be granted. The personal estate herein consists mostly of money in savings banks or in other banks on certificates of deposit. But a large portion of the personal assets (something over one-third) consists of promissory notes without indorsers or other security, so far as appears. The individuals or firms (makers of these notes) are doubtless solvent (no one has intimated anything to the contrary); still the law regards loans to a considerable—or, indeed, any —amount upon personal security alone as hazardous, and, if a loss were to occur upon such an investment by an executor, he would undoubtedly be held personally liable; but the rule goes further, and provides that even when such investments have been made by the deceased, it is the duty of his personal representative, if he would shield himself from liability for loss, to make collection of such assets at the earliest practicable moment. In this condition of the estate it would seem to be the imperative duty of the court, where any considerable delay in the appointment of a legal representative of the estate is likely to occur, to appoint a temporary representative to protect and preserve the rights of the parties interested. There is no one now authorized to receive money upon the securities if due, or when due, or to look after the interest of the estate, or to protect it should business difficulties affect any of the corporate or individual debtors of the estate. Besides, it is important that an inventory of the estate should be taken as soon as practicable, that there may be an official description and statement of the assets on file in the proper office for the use of all the parties interested.

This brings us to the next question in the case. It is insisted by the executors and proponents of the will that (if a temporary administrator must be appointed) the executors named in the

will, or one of them, should be selected for the office, and two reasons are assigned: (1) That Mr. Charles G. Eddy, the executor residing in this State, and who is named for the position, is a gentleman possessed of all the requisite qualifications for the office; and, further, that such appointment would be a saving of expense to the estate. (2) That the appointment of a disinterested person might in some way (in anticipated litigations) impair the rights or remedies of Mr. William B. Eddy and Mr. Charles G. Eddy, legatees and devisees, as well as executors, under the will of the deceased, in the maintenance of their claim that the bulk and body of the estate herein belongs to the estate of Charlotte S. Eddy, deceased, instead of the estate of William Eddy, deceased, as is asserted and claimed by Mrs. J. A. Cipperly. In regard to the first suggestion—that Mr. Charles G. Eddy, the executor (whom I esteem a very honorable, honest and trustworthy gentleman), should be appointed the temporary administrator—the answer is, that the courts have held with a great unanimity, of late at least, in passing upon this question, that a person interested in the estate, where there are conflicting interests, as in this case, should not be appointed temporary administrator. In *Matter of Stearns*, 2 Con. 272, 31 St. Rep. 960, the court says: "The holding of the courts seems to have been uniform in refusing to appoint an executor pending a contest in which he is largely interested, and where he is in a hostile position to, and his appointment is opposed by, the contestants." *West v. Mapes*, 14 Wkly. Dig. 92; *Matter of Plath*, 56 Hun, 223, 225. See, also, *Howard v. Dougherty*, 3 Redf. 535. As to the last-mentioned ground—that this application is made for ulterior purposes—it is sufficient to say, if I thought any undue advantage could possibly accrue to either party as against the other by the appointment of a temporary administrator, I would most certainly decline to interfere. But I cannot see that either party can be helped or hindered by the appointment of a disinterested person as temporary administrator. To be sure, the administrator, if he holds his office long, might, and perhaps

will, be compelled to defend the estate of Charlotte S. Eddy, deceased, against the claim that the bulk of the estate belongs to the estate of another; but the court cannot and will not assume that such defense will not be made by such appointee with zeal and fidelity in discharge of his sworn official duty. Besides, the parties really interested may intervene for the protection of their own interests (when their interest is defended through a representative), and thus be permitted to appear in person as well as by counsel in such litigations as may affect their interests. Code Civ. Proc., sec. 452; *Davies v. Fish*, 19 Abb. N. C. 24; *Chandler v. Powers*, 1 Civ. Proc. R. 355. I do not think I am at liberty to consider the suggestion that this contest is made solely for delay. This would be deciding the matter before the testimony is in. Moreover, the character of the gentleman conducting this contest affords ample assurance that the contest is conducted in entire good faith.

For the reasons above stated I am satisfied that a temporary administrator, who is disinterested, should be appointed, and, if the parties will name a suitable person, I will appoint him; otherwise, I will select a person for the office myself.

Ordered accordingly.

**In the Matter of the Application for the Sale of Real Estate of
JAMES T. CORWIN, Deceased.**

(Surrogate's Court, Orange County, Filed November, 1894.)

EXECUTORS—SALE OF REAL ESTATE.

One who holds a claim for funeral expenses is not a creditor of the decedent so as to entitle him to maintain a proceeding for the sale of the real estate to pay the same.

Application for the sale of real estate for the payment of debts.

Bacon & Merritt, for petitioner; John A. Thompson, for the next-of-kin.

COLEMAN, S.—An application to sell decedent's real estate. The petitioner's claim is for funeral expenses only. A motion is made, on behalf of the next-of-kin, to dismiss the proceedings as being unauthorized, the petitioner being neither an executor nor administrator nor creditor of the decedent. Code Civ. Proc., sec. 2750. An examination of sections 2749, 2750, 2752, 2754, and others, clearly shows a purpose to provide for the payment of funeral expenses, when necessary, from a sale of decedent's real estate, and it has been so held even where there were no unsettled debts. Matter of King, 10 Civ. Proc. R. 175. That purpose must, however, be accomplished in the way provided in the statute. Section 2750 provides who may present a petition to obtain a sale. It must be "an executor or administrator . . . or a person holding a judgment lien . . . or any other creditor of the decedent." So, an executor or administrator could undoubtedly have commenced these proceedings by filing the proper petition, but one who is the owner of the claim for funeral expenses could not, unless he is included in the term "creditor of the decedent." In determining whether such a person is so included, the act itself, as well as the usual definition of the term "creditor," may be considered. By looking through the several sections of the Code relating to the sale of real estate, we find that where it is provided what claims may be paid, what parties shall be brought into the proceedings, and as to all other matters, except where it is provided who may file the petition, the claim for funeral expenses is always mentioned by name, and is not treated as though included in the expression "debts." The omission is significant, and it may reasonably be supposed it was purposely done. Unlike ordinary debts, this claimant has a personal remedy for the claim against the executor or other person who contracted the obligation, and was, therefore, not given the right

to proceed against the real estate of the decedent for the collection of his claim. To suppose that such a claimant is included in the term "creditor of the decedent" would be to extend the scope of the expression beyond any fair or reasonable meaning of the term. The Matter of King, *supra*, is cited as an authority by the petitioner in this case, but it does not appear from the report of the case who was the petitioner in that proceeding. I am of opinion, for reasons before stated, that these proceedings should be dismissed, as unauthorized in the Code.

Proceedings dismissed.

In the Matter of the Judicial Settlement of the Accounts of
LYDIA D. ATWOOD, as Executrix of LEROY ATWOOD,
Deceased.

(*Surrogate's Court, Chautauqua County, Filed December, 1894.*)

1. GUARDIANS—LETTERS.

The issuing of letters of guardianship is not necessarily a judicial act. It is the order and not the letters that appoint.

2. EXECUTORS—EXPENSES OF EDUCATION.

A provision that the expenses of educating an infant legatee shall be charged against his share covers the services of doctors, dentists and oculists rendered to, and medicines furnished to him while at college.

Judicial settlement of the accounts of executors.

George Barker, for William G. Atwood, legatee.

SHERMAN, S.—The decedent died November 24, 1887. He made his will, dated April 1, 1886, which was probated January 2, 1888. The decedent left him surviving Lydia D. Atwood, widow, William G. Atwood, son, and Helen G. At-

wood, daughter, his only heirs and legatees, and appointed Lydia D. Atwood executrix, and Julian A. Clark, of Bloomington, Ill., executor. The decedent, at his death, owned property of the value of over \$14,000.

The testator, by such will, gave to his widow, son and daughter, respectively, certain articles of personal property, such as household furniture, books, paintings, etc., particularly mentioned in the first, second, third and fourth clauses of such will.

By the fifth clause of his will he directed the residue of his estate to be divided into three equal shares, giving one to his wife, Lydia D. Atwood, one to his infant son, William G. Atwood, and the other share to his infant daughter, Helen, with the provision that no division of that part of his estate should be made until his infant daughter, Helen, should arrive at the age of 21 years; and further provided by the same clause that his wife and children should receive their support and maintenance from his estate until the final settlement and division thereof; and the said fifth clause further provided as follows:

"My executors, for the purpose of providing both or either of my children with a liberal education, may appropriate such portion of the share of the said children, respectively, as may, in the judgment of my executors, be proper and necessary for such purpose, charging to such child, respectively, the amount so used for such purpose in the final settlement and division of my estate."

The said fifth clause also further provided that after his son, William, should arrive at the age of 23 years, and should desire to engage in business upon his own account, and require money for such purpose, if it should be deemed feasible and proper for him, the said executors should advance to him out of his share of the estate a sum not exceeding \$2,000 for such purpose; and also that the portion of the estate bequeathed to his wife, Lydia, should be received by her in lieu of all dower and thirds and interest in his estate. The will also authorized

the executors to sell the real estate, and apply the proceeds thereof, or invest same in other real estate, as they might deem best for the interests of all concerned.

By his will he appointed his wife, Lydia D. Atwood, testamentary guardian of the person and estate of his daughter, Helen, and appointed his brother, Julian A. Clark, of Bloomington, Ill., to be the testamentary guardian of the person and property of his son, William G. Atwood, on April 1, 1886, of the age of about 16 years, and his daughter, then of the age of about 9 years. The will further provided that his said executor and executrix should neither of them be required to give bonds for the performance in good faith of the trusts reposed in either of them by his said will.

Julian A. Clark was also appointed the guardian of the person and estate of William G. Atwood by letters of guardianship issued by the surrogate of said county, January 30, 1888, and made petition in due form for the judicial settlement of his account, filed December 20, 1893, as such guardian, and the said Lydia D. Atwood, on December 20, 1893, also presented a petition for the judicial settlement of her accounts as such executrix; upon both of which proceedings citations were duly issued and served upon all the said persons interested in said estate, both returnable before the surrogate on January 15, 1894, and both proceedings have since then been conducted and heard together. The only contested question in these proceedings related to the construction to be given by the surrogate to that part of the fifth clause of the said will above cited relating to the provision therein authorizing the executors to provide for a liberal education to both or either of the two minor children, and to appropriate such portion of the share of the said children, respectively, as might, in the judgment of his executors, be proper and necessary for such purpose, and charging to each child, respectively, the amount so used for such purpose in the final settlement and division of his estate.

It appeared in evidence, and was not disputed, that the executors, in September, 1888, sent the said William G. Atwood to school at Cornell University, where he remained in college during four school years, and graduated in June, 1892, and that they, or said Julian A. Clark, as guardian of said William, paid the necessary expenses of his board, traveling expenses, clothing, university fees, laundry, sundries, books and stationery, doctors' bills, and dentist and oculist charges; in all amounting to \$1,868.33.

Of the above sum of \$1,868.33, \$483.33 were paid for clothing during the said four years, and \$59.40 for the services of doctors, oculist and dentist, and for medicine for said William G. Atwood, he being under age; amounting to \$542.73.

No objection was made on the hearing to such expenditures, but it was strenuously claimed by the learned counsel for the said William G. Atwood that the said \$542.73 should not be charged to him in such accounting, and be taken out of his share of said estate on the final settlement, but that the same should have been paid by the executors out of the whole estate of the decedent, each of the three legatees paying an equal share thereof.

It appeared that no petition was made to the surrogate for the appointment of a testamentary guardian of William G. Atwood, minor, but an order was duly made and filed January 30, 1888, appointing said Clark the testamentary guardian of the person and estate of said minor, on which order and decree letters of guardianship were issued to said Clark, reciting that the said Clark had been legally nominated and chosen testamentary general guardian of said William, having taken the oath of office, required by law, and stating as follows:

"Now, therefore, we do allow and appoint you, the said Julian A. Clark, to be the general guardian of the said William G. Atwood, with such authority over his person and property, real and personal, as by law unto a general guardian appointed by the surrogate doth in any wise appertain, until he shall

arrive at the age of 21 years, or until you shall be superseded according to law."

Such letters were headed as follows: "Testamentary Letters of Guardianship—Minors over Fourteen," and were indorsed on the outside of said letters, above the filing thereof: "Testamentary Letters of Guardianship. Julian A. Clark, Guardian. Issued Jan. 30, 1888. D. Sherman, Surrogate,"—and the same were duly filed and recorded of that date.

The issuing of letters testamentary or of letters of guardianship, or of administration or letters of testamentary guardianship, is not necessarily a judicial act. Any clerk of the Surrogate's Court can do it, when founded upon a proper order, signed and sealed by the surrogate; such as was done in this case. The order appoints the guardian, administrator, executor, or testamentary guardian, and not the letters. Redf. Sur. (5th. ed.), pp. 32, 258. See approved form for testamentary letters of guardianship, Id., pp. 1038, 1039; Code Civ. Proc., sec. 2509, subd. 2.

The learned counsel for Julian A. Clark, executor and guardian of William G. Atwood, and for Lydia D. Atwood, widow and executrix, and as special guardian for said Helen G. Atwood, claimed that such sum of \$542.73 should, under the fifth clause of said will, be charged to and taken out of the distributive share of said William on final settlement, the same as the other charges for his education, amounting to \$1,325.60.

It appeared that the above sum of \$1,868.33 was paid by the executors to Julian A. Clark, after he received letters of guardianship as above stated, for the express purpose of his paying same for the education of said William G. Atwood; that said Clark sent same to him, from his residence in Illinois, from time to time, in drafts, as he needed it; the said William using such funds in procuring a liberal education at the Cornell University, and keeping an itemized statement of such expendi-

tures, filed with the surrogate, to which statement no objections were taken.

I hold it immaterial whether such funds were paid by Clark as general guardian or as testamentary guardian or as executor of the will, so long as he was authorized by the will to pay same, and complied with the clear intentions of the testator, as expressed in the fifth clause thereof, in making such payments. I direct decree that in the settlement of this estate the said sum of \$542.73 be charged to the distributive share of the said William G. Atwood, and taken from it, without commissions thereon to said Clark,—he consenting thereto,—and that the costs in these proceedings and on this accounting be paid out of the estate of the decedent to the respective parties, and that the said Clark be discharged as such guardian of said William G. Atwood, who is of full age.

Decreed accordingly.

In the Matter of the Judicial Settlement of the Accounts of
HIRAM E. BRATT, as Executor of LAURA E. RIEGLE,
Deceased.

(Surrogate's Court, Erie County, Filed December, 1894.)

1. LEGACY—FORFEITURE.

The mere formal appearance of a legatee and cross-examination of the witnesses on probate is not such opposition as will forfeit the legacy under a provision forfeiting it if the legatee prevents or opposes the will.

2. SAME—ACTION AGAINST EXECUTOR.

But the bringing of an action against the executor for conversion of property to which the legatee claimed ownership, but which the testatrix had bequeathed to others, will forfeit the legacy.

3. SAME—CONDITIONS.

So also, the failure to comply with conditions as to testatrix's burial will forfeit the legacy.

Judicial settlement of the accounts of the executor.

Charles F. Tabor, for the executor; George W. Cothran, for contestant.

STERN, S.—Hiram E. Bratt having rendered his account as executor under the will of Laura E. Riegler, deceased, this proceeding is on the judicial settlement thereof. Henry S. Riegler, widower and legatee under the will of the testatrix, objects to the allowance of several items for which the executor claims credit, embraced in schedules A and C of the account, on the ground that the executor is not entitled to such credit.

The executor, in reply, contends that Riegler cannot contest the account for the following reasons: (1) Because Riegler opposed the probate of the will; (2) because he prevented the execution of the will in bringing suit against the executor for converting certain articles of property which the testatrix bequeathed to other legatees; (3) because he did not bury the deceased in the burial ground at Hunt's Corners, as directed by her in her will.

If the claim of the executor is well founded, there is no necessity for entering upon the merits of the objections made by Riegler.

A party can only contest an account with respect to matters affecting his interest in the settlement and distribution of the estate. Code Civ. Proc., sec. 2728.

The property of the testatrix consisted of a note,—the amount collected thereon by the executor being \$806.23,—and household furniture, wearing apparel, a gold watch and chain, and other personal effects, inventoried at \$225.73. The testatrix made the following disposition of her property: \$500 to her husband, \$50 to the Baptist home and foreign missions, \$75 for her burial expenses, \$50 for a gravestone, and the residue of the money due her from any and all sources to her sister, Nellie M. Cole. Her household furniture, wearing apparel,

and other personal effects were distributed among her friends, and the closing dispositional clause reads as follows:

"Lastly. To Henry S. Riegle, my husband, my gold watch and chain, and the residue of my household goods. I also direct that my body be taken to the burial ground at Hunt's Corners for burial, in charge of Coleman & Jones, of Akron, undertakers. In case Henry S. Riegle prevents or opposes the execution of my will, I give all my personal property to Nellie M. Cole."

First. On the proceeding for the probate of the will Riegle appeared and filed objections, alleging that the instrument propounded was not the will of the testatrix. The only witnesses examined were the subscribing witnesses and Cora Cole, called by the proponents to satisfactorily establish what was required to admit the instrument to probate. Riegle's attorney cross-examined these witnesses. This he would have had a right to do without the filing of objections. On probate proceedings the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied with the genuineness of the will and the validity of its execution. Code Civ. Proc., sec. 2618. Upon such an inquiry it is the universal practice to permit the attorneys for the interested parties to examine and cross-examine witnesses. The inquiry related entirely to the examination the surrogate was obliged to make. It seems to me that a formal appearance and such an examination ought not to work a forfeiture of a legacy. To so hold would be unjust and unreasonable, in view of the above provisions of the Code. It may be that the legatee, by the simple filing of objections, accomplishes the forfeiture, because the legatee is bound to strictly comply with all of the conditions attached to his legacy. Story Eq. Jur., sec. 288. Riegle did not oppose or prevent the execution of the will. He interfered with none of the legal rights of the executor. He simply aided the surrogate in the performance of his bounden duty. I am led to the conclusion, that, before there can be a forfeiture of the legacies

given to Riegle, he must take some action beyond the ordinary cross-examination of witnesses necessary to prove the full execution of the will before the surrogate.

Second. I agree with the executor in his contention that Riegle forfeited his legacies when he brought an action against the executor, although individually, for the conversion of certain articles of property used by the testatrix and her husband in housekeeping, and which the testatrix bequeathed to other legatees. He established his ownership in the action. But a testatrix may dispose of property not her own, and put the owner to an election whether he will give up his property to the legatee, and take the provision made for him, or forfeit the provision made in his favor, and keep what is his own. *Havens v. Sackett*, 15 N. Y. 365; *Caulfield v. Sullivan*, 85 N. Y. 153; *In re Noyes*, 5 Dem. 315; *Leonard v. Steele*, 4 Barb. 21.

The intention of the testatrix is plain and unmistakable. She intended that these articles should be transferred to the legatees she named. Riegle prevented the consummation of her expressed wishes. He must be held strictly accountable, and suffer the consequences.

Third. I must also sustain the executor in his proposition that Riegle forfeited his legacies when he failed to comply with the direction of the testatrix in relation to her burial. Riegle was informed of the contents of the will on the afternoon or evening of the day of her death. This information came to him after he had bought a lot in another cemetery, purchased the coffin and engaged the undertaker. He had, however, ample opportunity to comply with her wishes had he so desired. He had charge of her funeral, and directed the preparations. The testatrix was not interred in the place where she directed, but in the lot which he purchased.

Among the English cases I find a case decided in 1882,—*Williams v. Williams*, 20 Ch. Div. 659. Justice KAY was of the opinion that a direction by will as to the disposition of the body could not be enforced. There being no property in a

dead body, it was impossible by will or any other instrument to dispose of it. The learned justice, however, was unable to find an authority precisely in point. Among the American cases I find that in 1872, in the case of *Pierce v. Proprietors*, 10 R. I. 227, *POTTER, J.*, gives an interesting review on matters relating to burials. He states that by the canon law every one was to be buried in the parish churchyard, or in his ancestral sepulchre (if any), or in such place as he might select; and that most people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject; and the right of a person to provide by will for the disposition of his body has been generally recognized. *Hon. Samuel B. Ruggles*, in an interesting note on the law of burial (4 Bradf. 503), recognizes the right of such testamentary disposition, but no authority is quoted by him on the subject. A quotation to the same effect is found in *Snyder v. Snyder*, 60 How. Pr. 368.

Many cases have come under my observation as surrogate where testamentary disposition has been made by a testator in relation to his funeral and burial, and it has been the universal custom, so far as my experience extends, to recognize such a right in the testator. The present state of society demands that courts should compel the performance of all reasonable directions made by a person in his will relating to his funeral and interment. If a person desires to pass from this earthly sphere through the legal process of cremation, he should have his testamentary wish effectuated by the court.

I shall hold that the condition the testatrix imposed upon her husband to be buried in a certain cemetery is valid, and must be complied with before *Riegle* can take the legacy.

Having agreed with the executor in his second and third contentions, it will be unnecessary for me to enter into the merits of the objections raised by *Riegle*, which objections must be dismissed.

Ordered accordingly.

Note.—A legatee, who is also a subscribing witness, forfeits his legacy by testifying to the execution of the will. (*Morse v. Tilden*, 35 Misc. Rep. 560.)

But where there were three subscribing witnesses and two of them give the necessary proof for probate, the third does not forfeit his legacy by testifying, as his testimony is unnecessary. (*Matter of Beck*, 26 Misc. Rep. 179; *Matter of Owen*, 48 App. Div. 507.)

In the Matter of the Estate of SAMUEL B. STRICKLAND,
Deceased.

(*Surrogate's Court, Cattaraugus County, Filed December, 1894.*)

1. EXECUTORS—ASSETS.

Where the testator's land was worked on shares, his share of the avails of milk taken to the cheese factory, which were paid to the administrator, do not go to the heirs at law as rent of the farm, but are assets of the estate.

2. SAME—SERVICES—MEMBERS OF FAMILY.

The fact that a married daughter left her home to care for her father, at his request, and that he stated that he had money to pay for her services and that she would be paid, is sufficient to overcome the presumption, arising from their relationship, that her services were gratuitously performed.

Judicial settlement of accounts of an administrator.

D. E. Powell, for administrator; O. S. Vreeland, for contestant.

DAVIE, S.—Samuel B. Strickland, late of the town of Otto, Cattaraugus county, died intestate on the 28th day of March, 1893, leaving him surviving a widow, one son and three daughters. Letters of administration upon the estate of the deceased were issued to the son, George M. Strickland, May 27th, 1893.

In the administrator's account filed for judicial settlement he charges himself with "cash from cheese factory, \$157.24," but during the progress of the accounting the administrator sought to withdraw this item from his account, claiming that the facts, as disclosed by the evidence, showed this fund not to be an asset, but to belong to the heirs. The circumstances from which this controversy must be determined are as follows: The intestate, at the time of his death, was seized and possessed of a farm of about 125 acres, and the owner of the stock and farming implements thereon. On the 9th day of November, 1892, he entered into an agreement in writing with one Jenkel relating to operating the farm during the ensuing season. Such contract provided that "the party of the first part agrees to rent his farm in the town of Otto, consisting of about one hundred and twenty-five acres of land, together with from fifteen to eighteen cows that are now on said place," until the 1st day of December, 1893; that Jenkel should do all the work on the place in a good, workmanlike manner, cut all noxious weeds, build the necessary fences, milk the cows with regularity, draw the milk to the cheese factory as soon as it should open, make butter when factory was not in operation, take good care of the cows, house, barn; do all the work as the first party (Strickland) might direct, and generally to perform the work upon such place under the direction of the first party; each party to furnish one-half of the seed and all other "findings," and pay one-half the taxes; the milk to be entered at the factory in the name of the first party; the proceeds thereof to be drawn by him, and out of such proceeds to pay the taxes, and to retain therefrom "what other moneys may be due the said party of the first part in consequence of the second party failing to perform such agreement on his part," and to pay one-half of what might remain to the second party; that the hay, straw, and "coarse fodder" be left upon the place; "and otherwise the place is to be let to the halves." The \$157.24 in controversy is the portion of the avails of the milk taken to the factory to which the intestate would

have been entitled had he survived, and which was in fact paid to the administrator.

It is claimed by the administrator that this money, under the provisions of the agreement referred to, is rent for the land, and not having accrued prior to the death of the intestate, belongs to the heirs.

The statute defines quite distinctly what are assets. Section 8, subd. 7, art. 1, tit. 3, pt. 2, c. 6, 2 Rev. St., provides that "rents reserved to the deceased, which had accrued at the time of his death," are assets. If, however, such rents had not accrued—that is, become due and payable—before his death, they belong to the heirs. This principle is not modified by the fact that the lease covers and provides for the use of personal property in connection with the real estate. *Fay v. Holloran*, 35 Barb. 295; *Marshall v. Moseley*, 21 N. Y. 280; *Armstrong v. Cummings*, 58 How. Pr. 332.

In the case last cited the court cites, among other authorities, the case of *Newman v. Anderton*, 2 Bos. & P. (N. S.) 224, where MANSFIELD, C. J., states the rule to be that "it must occur constantly that the value of the demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the lands and not out of the goods." Hence it is quite apparent that, if the agreement referred to was a lease of the farm, and the relation of landlord and tenant was thereby created between the intestate and Jenkel, and the money which the intestate was to receive from the avails of the milk taken to the factory was rent for the use of the farm, within the usual and technical meaning of the term, then the administrator is right in his claim, and he is not authorized to distribute this money as assets.

But the confusion in the mind of the administrator as to the proper disposition of this fund arises from a misunderstanding of the true nature of the agreement. The authorities are quite numerous holding that an agreement of the kind which the parties made in this case is not a lease, and that the profits

which the landlord derives from such an arrangement are not rent. In *Taylor v. Bradley*, 39 N. Y. 129, the agreement was very similar to that entered into between the intestate and Jenkel. In the case cited such agreement was under seal, and it provided that the owners of the land "do by these presents lease and to farm-let all said lands to the parties of the second part." Then followed specific details as to the furnishing of seed, the mode of cultivation, the care of the sheep, which were to be furnished by the first party, for a division of the wool produced, and that the second parties "should yield, pay and give to the parties of the first part one-half of all the grain raised, to be delivered," etc. The court, upon reviewing the various authorities construing agreements of this character, says: "The balance of authorities above cited seems to be that, notwithstanding the technical terms employed, such an agreement does not amount to a technical lease; that the relation of landlord and tenant is not contemplated, and the portion of the crops reserved to the owner is not rent, but compensation for the use of the land, while the other portion is compensation to the occupier for his work, labor and services; that the legal possession of the land is in the owner, and the two are tenants in common of the crop." To the same effect, see *Reynolds v. Reynolds*, 48 Hun, 142.

If, then, the contract between intestate and Jenkel was not a lease, the \$157.24 in controversy represents simply the earnings or avails of the personal estate of the intestate, and must be disposed of in the same manner as any other increase of the personal estate coming into the hands of the administrator.

The real estate of the intestate was encumbered by a mortgage thereon at the time of his decease, which mortgage was foreclosed after his death, and the premises sold, and a judgment for deficiency upon the bond of intestate accompanying such mortgage obtained, amounting to about \$1,000. This judgment is now owned by the contestant, and he has duly presented his claim to the administrator, and the claim has been

duly allowed. The total personal estate of intestate is insufficient to pay his debts in full; hence the question is whether the administrator shall distribute the fund in controversy among the creditors, or to the next-of-kin, of intestate. In view of the authorities above referred to, construing and determining the character of agreements like that existing between intestate and Jenkel, it must be held that this fund is an asset, and that it should be distributed, together with the other moneys in the hands of the administrator, among the creditors whose demands have been duly established, *pro rata*.

It appears from the account filed that Phoebe M. Hayes, a daughter of intestate, had presented an account to the administrator for labor and services claimed to have been rendered by her to the intestate during his last illness, which claim has been allowed by the administrator. The contestant objects to this item of the account, asserting that whatever services were rendered by the claimant, who is a daughter of intestate, were so rendered gratuitously, and without expectation of compensation therefor.

The evidence quite clearly shows that Mrs. Hayes attended upon and nursed the intestate during the last three weeks of his life, and that he was in a situation rendering his care somewhat onerous. The services were quite likely worth the amount charged. The question regarding this item is whether the evidence discloses that such services were rendered in consequence of the express promise of intestate to pay therefor, and, if not, are the circumstances attending the transaction such that the claimant is entitled to recover upon an implied promise?

I have carefully examined the authorities where claims for services rendered by one member of a family for another have been disallowed, and the fundamental principle underlying all such authorities seems to be that, where the relations existing between the parties are such that it is evident the services were performed as acts of gratuitous kindness and affection, without any expectation of pecuniary compensation, and in consequence

of reciprocal obligations and advantages, the law will not imply a promise to pay. The rule is stated in *Moore v. Moore*, 21 How. Pr. 223, to be that ordinarily, from the fact of rendition and acceptance of services beneficial in their nature, the law will imply a promise to pay what the services are reasonably worth. This implication may not be wholly repelled by the fact that the services are rendered to a parent by a son of full age, but the legal presumption of an obligation to pay is less strong where the relation of parent and child exists than in the case of persons not bound to each other. If to the relationship be added other circumstances tending to show, as a matter of fact, that the services were gratuitously rendered, without any expectation at the time on either side that payment was to be made therefor, the law will not imply a contract for compensation.

In this case the only circumstance from which it could be inferred that the services were gratuitously rendered is that of the relationship existing between the intestate and the claimant, but this is not sufficient to justify such inference in this case. The claimant was not a member of the intestate's family prior to the commencement of the services. She was a married lady, with a husband and family and home of her own. At the beginning of her father's sickness she went from her home to his residence, was requested by the intestate to stay and care for him, he saying, in substance, that he had money to pay for what was done for him; that he had money in his pocketbook to pay for her services; that he wanted her to stay, and that she should have her pay. These requests and statements, if not sufficient to sustain a finding that such services were rendered under an express promise to pay therefor, are certainly sufficient to overcome the presumption arising from the relationship of the parties that such services were gratuitously rendered. It should be held that this claim is a valid debt against the estate, and, as such, entitled to share in the distribution. A decree will be accordingly entered.

Decreed accordingly.

In the Matter of the Estate of ROBERT A. FORSYTH, Deceased.

(Surrogate's Court, Orange County, Filed December, 1894.)

TRANSFER TAX—BENEFICIAL INTERESTS PREVIOUSLY TRANSFERRED.

A transfer of a beneficial interest which occurred under a will made prior to the passage of chapter 399, Laws of 1892, or of the previous acts is not subject to the transfer tax, although it did not vest in actual possession until after such passage.

Proceeding to obtain the determination of the court as to the payment of the transfer tax by the trustee.

Robert A. Forsyth died November 25, 1873, leaving a last will and testament, dated October 4, 1871, which was duly proven before and admitted to probate by the surrogate of Orange county on December 4, 1873.

So much of the fifth clause of said will as is pertinent to the matter now before the court is as follows:

“Fifth. I hereby order and direct my executors, hereinafter named, to set apart and invest out of my estate the sum of two hundred and fifty thousand dollars, and keep the same invested during the lifetime of my wife, Charlotte W. Forsyth, and to receive the interest and income thereof, and pay and apply such interest and income as follows: . . .

“At and upon the death of my wife I direct my executors to pay out of the capital of said trust fund under this section of my will, to the children of my deceased sister, Isabella Little, then living, and the descendants of such of her children as shall be then dead, leaving lawful issue, the sum of forty thousand dollars, to be divided equally between them, the descendants of any deceased child to receive only what their parent would have been entitled to if living.”

On the 25th day of July, 1881, in an action brought by Robert Forsyth Little, the petitioner herein, against Charlotte W. Forsyth and others, a decree was entered whereby it was, among other things, “Ordered, adjudged and decreed that

Robert Forsyth Little be and he is hereby appointed trustee of the sum of forty thousand dollars, mentioned in the fourth subdivision of the fifth section of the said will, and which sum of money is therein directed to be paid at and upon the death of Charlotte W. Forsyth, the widow of said testator, to the children, then living, of the testator's deceased sister, Isabella F. Little, and the descendants of such of her children as shall be then dead, leaving lawful issue, to be equally divided between them, the descendants of any deceased child to receive only what their parent would have been entitled to if living."

Charlotte W. Forsyth, widow of the testator, Robert A. Forsyth, during whose lifetime said sum of \$40,000 was to remain invested, died on the 26th day of October, 1893.

This proceeding is instituted to obtain the direction of the court as to the payment by the trustee of the transfer tax upon the distribution by him of the fund of \$40,000, and the question presented to the court is, does the Transfer Tax Act of 1892 render this trust estate liable to the payment of any tax?

W. F. Dunning, for Robert F. Little; Louis Bedell, for treasurer of Orange county.

COLEMAN, S.—The testator died in 1873, and by the death of his widow, on the 26th day of October, 1893, the children of a sister of the deceased became entitled to the possession of a fund of \$40,000, which had been held in trust for the use of the widow during her life. And it is now to be determined whether said fund is subject to a transfer tax under that portion of the third subdivision of section 1 of chapter 399 of the Laws of 1892 which reads as follows:

"Such tax shall also be imposed when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer, whether made before or after the passage of this act."

In the case of Tallmadge v. Seaman, 9 Misc. Rep. 303, it is

held that this provision relates only to a transfer by conveyance, and that undoubtedly is the strict grammatical and logical construction to be given this sentence, occurring as it does in the same paragraph with transfers of that character. But the use of the word, "also" ("such tax shall also be imposed when," etc.), makes it doubtful whether the legislature intended so limited a construction; rather, possibly, it was intended to include transfers by wills. Added force to this possibility is given by the fact that beneficial interests in possession or expectancy are generally created by wills rather than by deeds. However, even if transfers by wills are included in this provision, such transfers are only made subject to the tax when the person or corporation becomes beneficially entitled, whether the transfer is made before or after the passage of this act. Becoming beneficially entitled is quite a different thing from becoming entitled to actual possession. In this case the legatees became beneficially entitled to their rights in the testator's property at his death in the year 1873. At the time of that event the transfer by the will of their beneficial interest occurred, while they only became entitled to the actual possession of the property at the death of the widow.

The transfer of the beneficial interest having occurred before the passage of this or of the previous acts, it is not subject to the tax, unless the act is intended to be retroactive. To conclude that this clause in the act was intended to be retroactive would be to extend its effect beyond the scope of the remainder and principal part of the act, which is not a necessary construction, and is improbable. It is very much more probable that it was intended simply to have this clause, in harmony with the rest of the act, cover transfers, if any there should be, whereby, either by will or deed, whether executed before or after the passage of the Act, a person or corporation thereafter should become beneficially entitled to any property. See *In re Brooks' Estate infra*. I therefore conclude that no tax is due, and that the appointment of an appraiser will be unnecessary.

Decreed accordingly.

In the Matter of the Estate of JOSHUA BROOKS, Deceased.

(Surrogate's Court, New York County, Filed December, 1894.)

TRANSFER TAX—POWER OF APPOINTMENT.

An estate or interest derived from a power of appointment executed after the passage of the Transfer Tax Act of 1892 is subject to the tax, although the power was created by a will executed prior to the passage of such act.

Petition by the trustees under the will of Joshua Brooks, deceased, to procure a determination as to the liability of the trust fund to the transfer tax.

FITZGERALD, S.—The petitioners are trustees under the will of Joshua Brooks, who died August 20, 1859, being a resident of the city of New York. Sophia Brooks, a daughter of said decedent, died May 28, 1893, in the city of New York, of which she was a resident. Under the will of Joshua Brooks, his said daughter was given the income during life of a certain trust fund, over the principal of which she was given the power of appointment by will. The will by which she executed this power has been admitted to probate, and the trustees now hold the said principal fund, consisting of more than \$100,000. This proceeding is instituted for the purpose of procuring a determination as to the liability of the fund to the transfer tax.

While at the date the will of Joshua Brooks went into effect there was no law subjecting to taxation transfers of property passing thereby, it is claimed on the part of the comptroller that, by chapter 399 of the Laws of 1892, a transfer of the character specified, when it takes effect in possession or expectancy subsequently to the passage of that Act, although it does so by virtue of a deed or will executed prior thereto, is nevertheless liable to taxation. To sustain this contention, he relies upon the sentence immediately preceding the clause at the end of subdivision 3 of section 1 of the Act, which reads as follows: "Such

tax shall also be imposed when any such person or corporation becomes beneficially entitled in possession or expectancy to any property, or the income thereof, by any such transfer, whether made before or after the passage of this Act." On behalf of the trustees and appointees, it is claimed that the sentence quoted applies only to transfers by deed, grant, etc., and has no application where the transfer is effected by will. The comptroller answers this by the argument that to limit the sentence quoted to cases of this description will necessitate a similar limitation to the very last clause of the section which fixes the rate of taxation. This suggestion, to my mind, fully meets and refutes the argument that the retroactive clause must be confined in its purpose and effect to the transfers specified in the preceding clause of the subdivision. Is, then, the fund or interest in question, and which is claimed to have passed under and by virtue of the will of Joshua Brooks, subject to taxation? I have concluded that it is. An estate or interest derived from the execution of a power of appointment is regarded as acquired under and by virtue of the instrument raising the power. Nevertheless, such estate or interest does not vest, nor is it created, until the time of appointment, although the source of its origin is found in the instrument conferring the power. *Jackson v. Davenport*, 20 Johns. 551, 552; *In re Stewart*, 131 N. Y. 274. The circumstance that the appointee takes under such instrument as the source of his title, and not any notion that the estate or interest taken becomes vested, or is created, either actively or constructively, at the time such instrument goes into effect, is the reason for regarding the estate or interest created by the power as passing by a transfer made by such instrument within the meaning of the acts for the taxation of decedent's estate. *In re Stewart, supra*. An estate or interest originating in the manner described is, with respect to the time of its creation and vesting, the same in effect as if it were an estate acquired by direct and exclusive operation of the instrument creating it, by a person who had come into being subsequently

to the time when the instrument took effect. The devise of a remainder dependent upon a life estate, and vesting in such person upon his birth, is an instance of the disposition last referred to. The estate or interest so acquired does not vest nor come into existence until, in one case, the power has been executed, and, in the other, until the beneficiary has come into being. A different result the doctrine of relation is incapable of producing, and it is properly confined in its application in such cases and for the purposes of the acts mentioned to referring the estate or interest to the source, whether immediate or remote, from which the title is derived. In the present case the estate or interest which the beneficiary has taken under the power, as well as the right of the possession thereof, came into existence after the passage of the act under consideration. Similarly, the beneficiary, as beneficiary, had no previous existence. Such being the case, there is no doubt that the beneficiary is, with respect to the estate or interest which he has so taken, a person who has become beneficially entitled in possession to property after the passage of the Act of 1892, by a transfer previously made. An appraiser will therefore be appointed.

**In the Matter of the Judicial Settlement of the Accounts of
JOSEPH LAMB, as Administrator of PETER RENNIE, Deceased.**

(Surrogate's Court, Westchester County, Filed December, 1894.)

1. LIFE TENANT—IMPROVEMENTS.

If a tenant for life makes improvements upon the premises, he cannot claim compensation therefor from the remainderman.

2. ADMINISTRATORS—LIABILITY FOR PREDECESSOR'S ACTS.

An administrator with the will annexed is not liable for a *devastavit* or misapplication of funds by his predecessor, especially after a decree settling the accounts of such predecessor.

Judicial settlement of the accounts of an administrator.

The testator, by his will, gave the use of all his estate, real and personal, to his wife, Agnes, during her life. He then provided as follows: "I also give and bequeath, upon the death of my wife, to Joseph Lamb, six thousand dollars; to his son, Osborne Rennie Lamb, three hundred dollars; to Rennie Pierre Schwerin, three hundred dollars; to Rennie Bell Dalston, three hundred dollars; to Agnes Rennie Lamb, three hundred dollars; to Peter Cummings, my executor hereinafter named, five hundred dollars as a small acknowledgment to him for his services as my executor, but none of these legacies shall become due or be paid until after the death of my wife."

In the next clause he gave his wife a power of appointment as to one-half of the residue of his estate, and then proceeded to dispose of it in case she died intestate; but she exercised the power. As to the other half he provided as follows: "The other half of the whole I devise and bequeath as follows: Five hundred of it to be given, after my wife's death, to my niece, Agnes Drew; the balance of it to be equally divided between my nephew, William Drew, and my niece, Ellen R. Drew, to have and to hold the same unto them, their heirs and assigns forever, this division to take place only upon the death of my wife." He appointed his wife and Peter Cummings executors, with a power of sale. He died in March, 1870, and the will was proved and letters issued to the executors in April following. In 1875 the widow, occupying the dwelling house and lot of the deceased, caused an addition something like a bay window to be made to the house at a cost of \$992.56. In 1879 Cummings, the executor, filed a petition praying for an accounting and a citation to the executrix to attend the same. No other person was named in the petition or cited. It resulted in a decree which fixed the balance in his hands, less costs and commissions, at \$17,826.97. The above sum of the cost of the addition was embraced in the credits allowed. In 1890, on an

application to resign, he rendered another account, charging himself with the above balance, all persons interested being cited except the Drews and the representatives of Robert Rennie, then deceased, who were not named in the petition. It resulted in a decree fixing a balance of \$16,901.60, which was directed to be paid to the executrix, and upon such payment being made his resignation was accepted, and he was discharged from all further liability. In April, 1891, on a petition filed, an order was made permitting the executrix to resign on rendering her account and paying to her successor, when appointed, the balance in her hands. Her account was filed the same day. In the same month Joseph Lamb filed a petition, praying to be appointed administrator with the will annexed, and was qualified and so appointed in June following.

John Henry Hull, for administrator; J. C. O'Connor, for contestant Rennie; Root & Clarke, for contestant Agnes Leech.

COFFIN, S.—Serious irregularities seem to have accompanied the proceedings in regard to this estate. In the first place, the executor caused only the executrix, the life tenant, to be cited on his accounting in 1879, in which he claimed and was allowed a credit of \$992.56, as the cost of the addition or bay window. All interested parties should have been cited, and thus had an opportunity of objecting to it. The allowance of it affected all the subsequent accountings, down to and including the present one, where it is, for the first time, questioned. Neither Robert Rennie, brother and next of kin of deceased, now dead, nor his personal representatives, nor the Drew children, or their personal representatives, were cited on any of the accountings preceding this. The Drew children all died anterior to the death of the widow, and, as their legacies were not given them until the death of the widow, they did not vest, but lapsed. *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 id. 92. Hence their representatives have no interest

in this matter, the amounts of their several legacies passing to the next of kin of the testator, among whom are the children of Robert Rennie, the contestant, Agnes Leech being one of them. Their right to appear in person, instead of by the executor or administrator of their deceased father, is not questioned by the learned counsel for the administrator, although it became a part of his estate to be administered. However, as the point has not been made, they will be treated as proper parties. As such, they object to the credit allowed to the executor, Cummings, for the money paid by him as the cost of the addition to the dwelling house. That objection, in the abstract, must be regarded as well taken. If the tenant for life make improvements upon the premises, he cannot claim compensation for the same from the reversioner or remainderman, though he is under no legal obligation to do more than keep the premises in repair. 1 Washb. Real Prop. (3d ed.) 110, par. 24, citing Corbett v. Laurens, 5 Rich. Eq. 307. The same rule, on like facts, applies as between landlord and tenant. A mere knowledge by the remainderman or reversioner of such an addition or improvement, which is alleged in this case, is not sufficient to render it a proper charge against the corpus of the estate.

There must be evidence of their assent that it be so charged. There might be cases where an expenditure should be apportioned between the life tenant and remainderman, as where an improvement, which is beneficial to both, is made under the direction of the public authorities, but not where it is voluntarily done by the life tenant for his own comfort or convenience. Still, it is not intended here to say that the administrator with the will annexed can be held liable for the devastavit—the misapplication of funds—by his predecessor, and especially after decree settling his accounts. In England, by the statute 30 Car. II, c. 7, it was enacted that, if an executor *de son tort* wastes the goods and dies, his executor shall be liable in the same manner as his testator would have been if he had been living. And

it was afterwards adjudged that a rightful executor, who wastes the goods of the testator, is in effect an executor *de son tort* for abusing his trust (3 Mod. 113), and his executor or administrator is made liable to a devastavit by statute 4 & 5 W. & M., c. 24. But I know of no such statute or ruling of the courts in this country. We hold, on the contrary, that even the fraud or negligence of one executor, who has thereby committed waste, is not chargeable to his co-executors unless they, in some way, contribute thereto, or might have prevented it by the exercise of due vigilance. It would be clearly unjust to hold a successor personally liable for the waste of any of his predecessors. Neither their father nor the present contestants were made parties to that first accounting proceeding, nor any of the subsequent ones, and hence it is believed that, notwithstanding his various accountings and discharge, the executor, Cummings, is still liable to account to these contestants, and to refund to them their share of the funds so misapplied by him. Their remedy is not against the administrator in this proceeding.

The executor, Cummings, was bequeathed a legacy of \$500 "as a small acknowledgment for his services as my executor," but not payable until after the death of testator's widow. It is not expressed to be in lieu of his commissions, and I think he is entitled to them in addition.

The interest received by the accounting party since the death of the life tenant, if any, must be accounted for here.

Ordered accordingly.

In the Matter of the Probate of the Last Will of FREDERICK
W. NOLTE, Deceased.

(Surrogate's Court, Queens County, Filed December, 1894.)

WILL—UNDUE INFLUENCE.

Two hours before the death of a man aged sixty, who had been suffering from Bright's disease, he made a will by which he gave his entire estate to his third wife, to the exclusion of his children by his former wives. The wife had property of her own, was strong mentally and physically, and had frequently importuned him to make a will, which he refused to do. She sent for the scrivener and witnesses, and gave him a stimulant, before the will was drawn. No other member of the family was present. *Held*, that testamentary capacity and want of undue influence were not shown.

Application for the probate of an alleged will.

Ullo, Ruebsamen & Cochran, for proponent; Isaac P. Hubbard and John F. Ward, for contestants.

WELLER, S.—After a careful review of all the facts, and mature consideration, I am satisfied the will in this case should not be admitted to probate.

The decedent was a man 60 years of age, had been ill for a long time, exceedingly weak in body and mind, and died about two hours and a half after the execution of the will. He had Bright's disease of the kidneys—a disease which always, more or less, affects the mental capacity of its victim. He had suffered from it for several years, and during the last two weeks of his life he was a great sufferer. He had been married three times, having children by his first and second wives, but none by his third wife. His third wife, the proponent of the will, is a woman of great mental and physical vigor; has a keen appreciation of her own interests; and the proof shows she never neglected an opportunity to enhance her worldly possessions.

The decedent bought real estate, the title of which was taken

in the joint names of himself and his wife, valued at between \$3,000 and \$4,000, all paid for by him, and the whole title of which she gets by survivorship. She had also accumulated, unbeknown to the decedent, between \$1,400 and \$1,500. She had also in her own right a house in 127th street, New York city, worth \$5,000 or \$6,000.

Now, between two and three hours before his death, the decedent executed the alleged will giving to this wife, by whom he had no children, all of his property of every kind, nature, and description, cutting off his children without a cent, some of whom were quite young. From beginning to end the evidence shows that he was very fond of his children. Nothing had come between them to estrange him from them. On the contrary, it appears from the testimony that within one or two days of his death he declared his intention to treat his children all alike, as they were all equally dear to him. Mrs. Dorothea Adam testifies that the decedent frequently declared in her presence that he would not make a will; that his children were all alike dear to him. Frederick Bergmann, Sr., brother of proponent, testifies that on the 11th day of December, two days before he died, at the decedent's request, he went to him, and decedent said "he would not make his will, as all his children were the same to him; they were all as one to him, and that he would give them the same." He further said: "My wife will get the house what is her own, and that is enough, and she will get a third besides." Hugo Adam testifies that he was at the house of decedent at 8 o'clock on the night of his death, and, about two hours before making the will, decedent said to witness: "I want all my children to have the same if I should die or anything happened to me." Other witnesses testify that he had frequently said, but a little while before his death, that he wanted his children all to have the same, and that he did not intend to make a will.

Now, what was it that came between him and his children between 8 and 10 o'clock in the evening of the day of his death

that should induce him to change the whole current of his intentions towards his children, and to get him to make a will cutting them all off without a dollar, and giving everything to his wife? This third wife, powerful, vigorous, mentally and physically, almost alone surrounding him during the last two weeks of his illness, gets all his property by this alleged will. Suspicion at once attaches to a will giving to a person with such power and influence all that he possesses in this world, to the exclusion of other beloved ones, and who were equally the natural object of his bounty. It was her duty, under the circumstances, to clearly establish that the will was executed free from all influences, and was his intelligent, voluntary act. "The rule is well understood that where the will of a sick person is contrary to his previous declarations and fixed purpose, it is the duty of courts to scrutinize closely with a view of ascertaining whether the act was free, voluntary, and intelligent." *McLaughlin v. McDevitt*, 63 N. Y. 213, and especially at pages 217, 219, 220. And "a change of previously expressed intentions, as bearing upon the allegation of undue influence in procuring a will, is an important circumstance." *Horn v. Pullman*, 72 N. Y. 276.

The sole beneficiary under the will (the third wife), from the testimony, appears to have been constantly beseeching the decedent to make a will in her favor. Roman Adam testifies that about two or three weeks before his death the decedent said to him: "My wife is bothering me so much in regard to making a will, and I do not want to do it." And the same witness testifies: "My wife is bothering me to make a will. I will not do it. My children are alike dear to me, and my wife is well enough off. She has got enough to live on; has her own house."

On the same page the same witness said that he was there at the house on the Sunday before he died, and after Mrs. Nolte and the doctor went out of the room the decedent said: "I am very weak; I feel very weak, but I believe I will not make a will anyway. My children are all alike dear to me; I will

not make a will" And the witness continued: "Then his wife came in and he kept quiet." On the cross-examination the same witness further testifies that decedent said, on November 30, 1883: "I do not know what it is; I have so much trouble. My wife is bothering me to make a will. My children are all alike dear to me. I do not want to make a will."

Frederick Bergmann, Sr., brother of proponent, testifies that decedent had very often said he would not make a will, and further said that his wife had very often asked him to make his will, but that he had refused and told her so. On the cross-examination the same witness further said that decedent stated: "My time is nearly gone; I shall not stay long here. I will not make a will. One child is as dear to me as another. My wife has a house belonging to herself, and then she has one-third part. She is well taken care of."

I do not find in the minutes any denial by Mrs. Nolte herself that she had importuned the decedent to make a will, as testified to by the witnesses. Thus we find the decedent constantly reiterating that his children were all alike to him, and that he did not intend to make a will discriminating against them, and constantly resisting the importunings of this wife to make a will in her favor, down to within a few hours of his death. And yet, within two hours after the declaration that he wanted all his children to have the same if he should die or anything happen to him, he makes a will giving everything to his wife, and cutting his children off without a dollar. Mrs. Nolte admitted to Dorothea Adam that she had "tried hard to get her husband to make his will, but I cannot get him to do so."

All this testimony throws around the document great suspicion. But the mode and manner of securing its execution increases the suspicion that the will was forced from the decedent (while he was in a weak mental condition) by the beneficiary. She (Mrs. Nolte) sent for Mr. Howard to draw the will. She also sent for the witnesses, and she herself admits that she sent for the witnesses. Mr. Hugo Adam, whom Mrs.

Nolte sent for the scribe who drew the will, testifies that when he returned with Mr. Howard he asked her if he should go upstairs with Mr. Howard, and she said: "No; she would go up first, and give him (decedent) some wine." This witness further testifies that she would not allow either Mr. Howard or himself to go up until she had gone upstairs herself first, and given the decedent some wine; that she was gone upstairs ten minutes before she came down and allowed Mr. Howard to go up; and that when Mr. Howard started to go up she stepped between him and Mr. Howard, and told him to "stay down stairs, and send up the witnesses as soon as they came." Mrs. Nolte went upstairs with the scribe, and remained there all the time the will was being drawn and executed, and none of the family except Mrs. Nolte was in the room at the time of its execution. The will was immediately given to Mrs. Nolte, and the decedent never possessed it. In about two hours and a half the decedent died, and about half an hour afterwards Frederick Bergmann, Sr., brother of Mrs. Nolte, came to the house, and she exclaimed to him: "Mr. Nolte has made his will; everything belongs to me. I am saved."

I am satisfied from the whole evidence that Mrs. Nolte exercised that great influence which she had acquired over him, and destroyed the decedent's free will and agency, thereby making his mind subservient to her own, while he was in a condition so feeble as to make it necessary to give him stimulants to enable her to carry out her scheme. Again, I am not satisfied that at the time of making the will, about two hours before his death, the decedent had mental capacity sufficient to make a will. He lived but two hours and a half, and various witnesses testified that before the will was made he had rattling in his throat, indicating the near approach of dissolution. And at the time that Mrs. Nolte told Hugo Adam to go for the scrivener the doctor said to him: "Do you think he has his senses?" The doctor himself has not been produced, and it is the duty of Mrs. Nolte to throw all light possible upon the mental condition of

the decedent, and around the mode and manner of the execution of the will. Why does she not produce the doctor? The decedent was afflicted with a disease that sooner or later affects the mind. The decedent had refused constantly her importunings to make a will, and finally, within two hours of his death, she gets him to make a will contrary to his repeated intent, cutting off all of his children, whom he dearly loved, and making her, who was already well provided for, the sole beneficiary of all his property. I cannot believe that the decedent made this will uninfluenced by his wife and while he was in his right mind. The will must be rejected. Let a decree be entered accordingly. Probate denied.

In the Matter of the Estate of SAMUEL R. WEED, Deceased.

(*Surrogate's Court, Madison County, Filed December, 1894.*)

TRANSFER TAX—BASIS OF.

The amount received by a legatee on an assignment of the legacy is not a proper basis for the assessment of the transfer tax; the proper basis is the existence of assets in the executor's hands.

Assessment of the collateral inheritance tax against the estate of Samuel R. Weed, deceased.

M. H. Kiley, for administrators of S. Henry Davis, deceased;
E. N. Wilson, for Carrie W. Johnson; J. A. Johnson, for comptroller.

KENNEDY, S.—Samuel R. Weed died at the town of Cazenovia, N. Y., on the 20th day of August, 1891, leaving a will in and by which, among other legacies, he gave to Carrie W. Johnson \$2,000 and appointed his nephew, S. Henry Davis, one of his executors. At the date of his will, July 15, 1887, he was supposed to be worth \$20,000 or more. Immediately after his death his legatees learned that said Davis had destroyed the will, and also claimed that the testator left no prop-

erty. Investigation showed that said Davis had obtained substantially all the money and securities owned by the testator, and invested them in his own name, or in the name of another in his interest, in speculative schemes or property in other States which were of very little value and practically worthless. Within a day or two after Mr. Weed's death, Mrs. Johnson demanded of said Davis the amount of her legacy, and, by means of threats of prosecution for his criminal act in destroying the will, procured from him the amount of her legacy, she at the same time assigning it, and all her interest in and to the same, to said Davis. This legacy was paid for with the individual property of said Davis, no part of the consideration having ever belonged to Mr. Weed, nor was any part of it the avails of property which said Davis ever obtained from the testator. Within a few days after the payment of this legacy said Davis died, and administrators were appointed to settle his estate. Proceedings were thereafter commenced in the Surrogate's Court to establish and probate said destroyed will, and, after considerable time spent in litigation, the same was duly admitted to probate. The total assets of the Weed estate, as ascertained by the parties interested and by the appraiser appointed for the purpose of assessing the inheritance tax, amounted to the sum of \$719.50, from which is to be deducted \$150 for funeral expenses, leaving only the sum of \$569.50 to be distributed among the legatees. The *pro rata* shares of this sum among the legatees of said will, omitting some expenses of administration, are as follows: Carrie W. Johnson, niece, \$112.76; Susan Davis, sister, \$169.14; Edwin R. Davis, nephew, \$112.76; S. Henry Davis, nephew, \$169.14; Presbyterian church, \$5.63.

Assuming that the amounts of the shares of the niece and nephews are as above stated, they are not liable to any tax, for the reason that all of them amount only to the sum of \$394.66. A tax, however, of five per cent. was assessed upon Mrs. Johnson's legacy of \$2,000, being the sum paid to her by S. Henry Davis, upon the theory that, having received the amount desig-

to collect it from any other source. Whether a legacy is of much or little value, or whether it will sell for its face or not, is a matter with which he has nothing to do, and over which he has no control. The tax thereon can neither be increased nor diminished by any act of the legatee. An assignee purchasing a legacy buys it at his peril, and has no remedy against the estate if there should be a loss from his investment. In the present case Mrs. Johnson has received no property from the Weed estate in payment of her legacy, and makes no claim for it. She owes it nothing, and is under no obligation to it, because she has received nothing from it. The estate owes her nothing, and can demand nothing from her. She has parted with her legal right to the legacy bequeathed to her, but in parting with it neither she nor the assignee could deprive the State of its legal right to collect the tax that might become due upon the decedent's property if it were of sufficient amount to be taxable. This right is based upon the existence of assets in the hands of an executor. He must deduct the tax or collect it from the property in his hands. He can maintain no action against the legatee for the recovery of the tax on personal property. He must get it from the assets in his hands, and, having done this, his duty is ended. In this proceeding the total assets of the Weed estate are \$719.50, and yet Mrs. Johnson or her assignee is asked to pay a tax on \$2,000, being \$1,280.50 more than the testator was seized or possessed of at the time of his death. These figures are an unanswerable argument against the claim of the State for the recovery of any tax whatever. An order may therefore be entered vacating and setting aside the former assesment of the tax in this matter. An order may also be entered allowing each appellant \$20 costs and expenses on each appeal, payable from any inheritance taxes in the hands of the county treasurer; but this order is conditioned upon and subject to the approval of the comptroller of the State of New York.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Accounts of
JOSEPH SPEARS, as Executor of WILLIAM C. SPEARS,
Deceased.

(Surrogate's Court, Westchester County, Filed December, 1894.)

1. **WILL—TRUST—POWER OF SALE.**

A provision leaving the disposal and division of the property to the judgment of the executor, the same "to be sold or held as he may deem best for the interest of my heirs," does not create a trust, but only confers a power of sale on the executor, to be exercised in his discretion.

2. **EXECUTORS—ASSETS.**

It is the duty of the executor to convert the personal property, especially such as requires expense for its care, as soon as possible.

3. **SAME.**

An executor will be held liable for the value of perishable property, such as plants, where their destruction was caused by his negligence.

4. **SAME—RENTS.**

Where there is a mere power of sale, the rents and expenditures on the real estate form no part of the executor's accounts.

5. **SAME.**

An executor is chargeable with the rents of leasehold property.

Judicial settlement of the accounts of an executor.

The deceased left a widow, Hattie S. Spears, a son, William J. Spears, and two minor children. He was the owner of valuable real property at Clausen's Point, Westchester county, where he died, estimated to be of the value of about \$100,000. He also had a leasehold estate in No. 2472 Second avenue, New York city. The inventory of the personal property amounted to \$700, including two horses valued at \$200. There was a large greenhouse on the premises at Clausen's Point full of plants and shrubs which were not included in the inventory, and which were subsequently destroyed by frost. The deceased and the executor had been copartners in business, but had dissolved the connection about a year prior to the death of the former, which occurred in 1891. They had, as partners, a joint

account in a city bank, which was not changed at the time of dissolution. At the time of testator's death the amount was about \$2,300. The will of the deceased, made in 1890, was as follows: "I, William C. Spears, being of sound mind and about to go to Florida, make this my last will and testament:

"I hereby make my brother, Joseph Spears, sole executor, and leave to his judgment, as he may see fit, the disposal of my real and personal property, to be divided among my heirs as his judgment may deem best and most fitting to him, and to be sold or held as long as he may deem best for the interest of my heirs."

Sackett & Lang, for executor; Samuel Keeler, for contestant, William J. Spears, and special guardian for minors.

COFFIN, S.—The first thing to be considered is whether the rents accrued from and the expenditure upon the real estate at Clausen's Point are proper items to be considered upon this accounting, or have any proper place in the account. This depends upon the construction of the will. It seems quite clear that no valid trust under the statute of uses and trusts is created. The cases on the subject are numerous, but only a few need be cited. *Smith v. Bowen*, 35 N. Y. 83; *Cooke v. Platt*, 98 id. 35; *Chamberlain v. Taylor*, 105 id. 185; *Clift v. Moses*, 116 id. 144. The use of the word "disposal" can mean nothing more than a sale, and the words "to be sold or held as long as he may deem best for the interest of my heirs," confer only a power of sale, to be exercised in the executor's discretion. In fact, the will confers only a power of sale for the purpose of division among his heirs in the manner he may deem most fitting. The title vested in the widow and heirs, and so remains, subject only to the exercise of the power. The remedy, if any, in regard to the rents and the claim for expenditures, must be sought in some other tribunal having a jurisdiction which this court does not possess. The two horses mentioned in the inven-

tory remain unsold, partially for the alleged reason that the sale was deferred at the request of the parties in interest, with the expectation or hope that they might bring a larger sum in the future. It is the settled rule that the duty of an executor is to convert the personal estate into money with as little delay as may consist with the interests of the estate, and this rule applies with greater force where the delay engenders an expense in keeping the property. The executor should have disposed of these horses as speedily as fairly possible, without regard to the wishes of the beneficiaries, unless all were *sui juris*, which they were not. The delay has caused a large expense for their care and keep, which the executor seeks to have allowed to him. He should be charged with the value fixed by the inventory, and allowed for care and keep for six months, which gave him ample time for their conversion into money, and with interest from that period. The executor must be held liable for the value of the plants and shrubs in the greenhouse, which were personal property, and whose destruction was due to his negligence. Their value is not satisfactorily established, but it is believed that at an auction or private sale they would not have yielded a net amount of more than \$150, and the executor should be charged with that sum. The contestants seek to surcharge the executor's account by adding to the debtor side the one-half of the sum of about \$2,300, which was in bank in the joint names of himself and the deceased. Of course, it was incumbent on them to establish this claim, and they examined the executor, who furnished all the evidence on the subject, with that view. He testified that the whole belonged to him, and the facts stated by him tend to show that such was the case. It is not, therefore, a debt due the deceased from him. The executor should be charged with the net rents of the premises on Second avenue, New York, where not already so charged. It was and is leasehold property, and therefore assets. Counsel for contestants is content that it remain unsold, as it produces a satisfactory income. The corrections of the account should be made according

to the stipulation as disclosed by the minutes of the testimony. If the decision of any point has been omitted, attention may be called to it on the settlement of the same, when it will be disposed of.

Ordered accordingly.

Note.—Affirmed, 89 Hun, 49.

In the Matter of the Judicial Settlement of the Accounts of
JOSEPHINE C. DUSENBERRY et al., as Administrators
of JONAH C. BRUNDAGE, Deceased.

(Surrogate's Court, Westchester County, Filed December, 1894.)

1. SERVICES—MEMBERS OF FAMILY.

In the absence of a contract, express or implied, to pay for services rendered by a child, no claim therefor can be made, as it will be presumed that such services were gratuitous.

2. SAME.

Declarations by a father, made during the absence of the daughter, and not communicated to her, that she "ought to be paid," and that "she should be paid for what she did for him," are not sufficient to overcome such presumption.

Judicial settlement of the accounts of administrators.

The intestate was a farmer living in the town of Rye. He lost his wife about 1879 and remained a widower until his death, which occurred about April 1, 1892, at an advanced age. He left him surviving two daughters and a son, the administratrix and Rose J. Lockwood and Frank S. Brundage, and four grandchildren, the children of deceased daughters. The administratrix, with her husband, who was in feeble health, went to live in the family of the intestate about 1883, the hus-

band aiding in the farm work to some extent, and she assisting in the housework and pursuing her trade of a dressmaker. After about two and a half years the husband died, leaving no issue. The wife continued to live with the intestate until his death, doing housework and following her trade as she had leisure. She now presents a claim for services as housekeeper and as nurse, amounting to \$850, which is disputed by some of the next of kin. The account filed shows the personal estate to be about \$450.

Platt & Thompson, for claimant; James B. Lockwood, for next of kin.

COFFIN, S.—The only matter in controversy in this case is in regard to the claim made by the administratrix for services, etc., rendered to the deceased during his lifetime. There is no evidence whatever of any expressed or implied contract between the deceased and the claimant as to compensation for her services; and in the absence of such contract, express or by fair implication, the authorities are abundant to the effect that she cannot recover, because of the relation between parent and child, the presumption being that such services were gratuitous, and such as were due from the child to the parent. *Williams v. Hutchinson*, 3 N. Y. 312; *Marion v. Farnan*, 68 Hun, 383; *Ulrich v. Arnold*, 120 Pa. St. 170. Other cases might be cited, but these are deemed sufficient.

The only proof on which it is sought to base the inference that there was a contract is that the deceased said to others: "She ought to be paid." "She should be paid for what she did for him." In no instance was the claimant present when these declarations were made, nor were they communicated to her, and they are not evidence of either an express contract or of a mutual understanding which would take the matter out of the well-settled rule. The claim is rejected.

Ordered accordingly.

In the Matter of the Will of NICHOLAS SEAGRIST, Deceased.

(*Surrogate's Court, New York County, Filed January, 1895.*)

1. WILL—ACKNOWLEDGMENT.

An acknowledgment of a will may be made either directly by words or as an affirmative answer to a question.

2. SAME—EXECUTION.

Where there are no circumstances indicating want of good faith, testimony of the draftsman as to instructions received from the testator and that he followed them is sufficient to show knowledge by testator of the contents of the instrument.

3. SAME—TESTAMENTARY CAPACITY.

One who is able to call to mind the character and extent of his property and express his wishes in regard to its final disposition has testamentary capacity, although he is very feeble.

4. SAME—UNDUE INFLUENCE.

Where there is no proof that anyone suggested to testator the dispositions contained in the will, and they conform to his expressed intentions, the mere fact that the principal beneficiary had the opportunity, and even the motive, to secure the largest share of the property does not import the exercise of undue influence.

Application for probate of will.

Lewis Johnston and Edward W. S. Johnston, for proponents; Bernard J. Tinney, for Theresa Seagrism; Robert E. Deyo, Edward S. Clinch, John P. Phelan and Joseph H. Hayes, for contestants; Edwin B. Root and Gilbert W. Minor, special guardians.

FITZGERALD, S.—Nicholas Seagrism died early on the morning of April 15, 1894. He was advanced in years, and was a bachelor. At four o'clock in the afternoon of April 14th, eight hours previous to his death, he signed the paper propounded as his will, and it was attested by five witnesses, two being physicians, a father and son, the elder of whom had been his attending physician. Two other witnesses were also a father and son, the elder a clergyman, neither of whom had had any previous

acquaintance with the deceased. The fifth witness was a lady friend of Mrs. Theresa Seagrist, the principal legatee under the will, who was a niece of the testator and is the wife of the executor. There was also present at the execution Mr. Orrell, who had been for many years the attorney of the deceased, was his confidential friend, and had drawn the instrument in question at his own home in Brooklyn on April 13th, the previous day, as he states, from instructions that he previously received from the decedent.

The probate of the paper is resisted upon all the grounds usually interposed to contested wills. Each subscribing witness testified to the facts essential to a valid execution. The statements only differ in respect to details. Where the Drs. Campbell state that the declaration that the paper was his will was made by the deceased as an affirmative response to a question put by Mr. Orrell, the Messrs. Treat and Miss Woodworth state that the declaration was in words that the paper was his will. Their testimony is confirmed by that of Mr. Orrell. Either the memories of the Drs. Campbell or those of the other four witnesses are at fault in respect to the form of the declaration; but that the statutory requirement in respect thereto was complied with in one or the other form cannot be questioned. Six respectable people, two of whom had never before met Mr. Seagrist or the other witnesses, can hardly be supposed to have entered into a conspiracy to foist a fictitious testament upon Mr. Seagrist.

The contestants claim that there is no evidence that Mr. Seagrist knew the contents of the instrument he signed. Mr. Orrell testifies that it was drawn in accordance with the instructions received by him from Mr. Seagrist. I have already decided upon authority that, where there are no circumstances showing want of good faith, it is not necessary to prove that the testator gave the instructions for the will, that he read it, that it was read to him, or that he was made acquainted with its contents at the time of the execution. *In re Hall's Will*, 5 Misc. Rep.

461, and cases there cited. But in this case Mr. Orrell testifies to the instructions received, and that he followed them in drafting the paper.

In respect to Mr. Seagrist's mental capacity, it is shown that while he was very ill, and near to his death, he had sufficient strength to take the pen, and in a feeble manner sign his name to the paper, declare its character, and request the witnesses to attest it, and each of the five testify that he was of sound mind at the time. It is also shown that he was a successful and prosperous man of affairs, though modest and reticent in referring to them; that he had accumulated property of more than a quarter of a million dollars; that he had been accustomed in a small way to draw and superintend the execution of legal papers, including wills, and attending to their probate. Unless the testimony of Mr. Orrell is to be wholly discredited, for which I see no reason, Mr. Seagrist was able to call to his mind the character and extent of his estate, and express his wishes in regard to its final disposition, not only at the time he gave the instructions, but at the time of the execution of the paper, and there is nothing in the evidence to lead me to doubt that his mind did intelligently accompany the act of execution. The signing immediately afterwards of the two satisfaction pieces to mortgages, though feebly done, one with his mark, followed by his death a few hours afterwards, does not lead me to doubt his capacity to execute either the will or the satisfaction pieces. The scheme of the instrument was simply a gift of his personal estate to a favorite niece, and a devise of one-half of his real estate to her, and the residue to his other nieces and nephews, all of whom are named in the instrument.

In respect to the issue of undue influence, the relations of Mr. Seagrist to his kindred, all of the same degree, show excellent reasons for the discrimination in favor of his niece, Mrs. Seagrist. She had been left an orphan in childhood, and had been commended to his care by her father. Mr. Seagrist had been her guardian, and she was under his eye thenceforward; was a

member of his household; and when she married, with his approval, her husband also became one of the family. Mr. Seagrism spoke in affectionate terms of his niece and in praise of her husband. Not once, but on various occasions, he stated that she should be the principal object of his testamentary consideration. In respect to his other nieces and nephews, his declarations showed that he entertained for them little or no affection; that, while he was indifferent to all, for some he had a feeling of repugnance. Had he disinherited them, the act would not have been at variance with his expressed sentiments. There is no proof that any person suggested to the decedent the dispositions contained in the will, and I have every reason to believe that the scheme of the instrument was Mr. Seagrism's own. Though his favored niece had the opportunity, and even the motive, to secure the largest benefaction, the fact does not import the exercise by her and her husband of undue influence. Those who raise the issue must prove it affirmatively. It is seldom that its exercise can be shown by direct proof. The contestants seek to sustain their case merely by showing the declarations of the husband of the principal legatee, that the deceased did not want to make a will, but that the doctor "got around" him, and he consented, which statement the husband denies. Other statements of the husband are also proven. But in this court it is well settled that the declarations of a party in interest, even a principal legatee, cannot militate against the interest of the legatees. *La Bau v. Vanderbilt*, 3 Redf. 399, 408.

The contestants also urge that the failure of certain witnesses to disclose the fact that the satisfaction pieces were executed after the will had been signed and attested should be considered as a link in the chain of evidence to establish undue influence. They are not inconsistent with the unconstrained action of the testator. Nor does the fact that the husband of the principal legatee, in endeavoring to get letters of temporary administration, stated that the personal estate did not exceed \$8,000 have any greater significance. Such facts may raise doubts in re-

spect to the good faith of the persons who make the statements, but they do not justify the rejection of a will which conforms to the declarations of the deceased, and are consistent with the relations shown to have been sustained by him to the different parties in interest.

I have carefully read the able briefs of counsel, and, without presenting an analysis of the large volume of testimony taken in the proceeding, it is sufficient to state as my conclusion that the contestants have failed to overcome the case presented by the proponents, and I will sign the decree admitting the paper to probate.

Probate granted.

In the Matter of the Estate of EDWARD HOWARD, Deceased.

(Surrogate's Court, Cattaraugus County, Filed January, 1895.)

1. LIMITATION—CLAIM OF SURETY.

Where a debt is paid by a surety after the death of the principal, the statute does not begin to run against his claim for reimbursement until the appointment of an administrator.

2. SALE OF REAL ESTATE.

A proceeding to sell real estate for the payment of debts may be maintained, although there has been no judicial settlement of the accounts of the administrator; but in such case the petitioner must show affirmatively that all the personal property applicable to the payment of debts and funeral expenses has been so applied, or that the executors or administrators have used reasonable diligence in converting and applying the personal property to the payment of debts and funeral expenses, and that it is insufficient.

3. SAME—JURISDICTION.

The fact that, in such a proceeding, the claim of the petitioner is disputed does not deprive the Surrogate's Court of jurisdiction to determine its validity.

4. SAME.

The fact that the devisees have quitclaimed their interests to a claimant against the estate does not deprive him of the right to maintain a proceeding to sell the real estate to pay his claim.

Application to sell real estate for payment of debts.

Wm. Woodbury and D. E. Powell, for petitioner; J. G. Record, for Julia A. Hogan; W. H. Henderson, for contestant.

DAVIE, S.—This proceeding was instituted in view of the determination of the Court of Appeals in *Hogan v. Kavanaugh*, 138 N. Y. 417.

Edward Howard died in the month of September, 1864, leaving a widow, one son and three daughters. His will, bearing date March 24, 1864, with a codicil thereto, dated April 21st of the same year, was admitted to probate January 25, 1865. No executor was named in the will or codicil, and no letters were issued until October 9, 1893, when letters of administration, with the will annexed, were issued to Deborah Kavanaugh, a daughter of testator and the wife of the petitioning creditor. She caused the usual notice to creditors to be published, and the claim of the petitioner was the only one presented. The petition in this proceeding was filed March 27, 1894.

At the time of the testator's death there were outstanding thirteen promissory notes, of \$100 each, all signed by the testator and the petitioner, none of which were due at testator's death. Upon or after their maturity these notes were paid by the petitioner, and the amount paid by him, with interest thereon, constitutes the claim which he seeks to enforce in this proceeding.

It is claimed on behalf of the petitioner that these notes represented the individual indebtedness of the testator, and that petitioner signed them merely as surety. The contestant, on the contrary, asserts that the petitioner himself was the principal debtor, and the testator surety for him. The determination of this question necessitates a reference to the transactions out of which the indebtedness arose.

On the 15th day of December, 1854, the testator was the owner of certain lands in the town of Persia, and on that day

conveyed the same to his son, George M. Howard. The deed recited the consideration to be \$700, and added that "the lands hereby conveyed for the consideration above mentioned, which is much less than their true value, are intended and received as an advancement by the said Edward Howard, the father of said George M. Howard, to said George as and for his part and just portion of the property of his said father, so that the said George is not entitled to inherit or receive any other property of his said father as heir or distributee."

On the 5th day of March, 1858, George M. Howard and wife reconveyed these lands to the testator for the consideration, as expressed in the deed, of \$1,080. To secure the payment of such consideration, the testator delivered to George M. Howard two promissory notes, for \$500 and \$580, respectively. Both of these notes were signed by the testator and the petitioner. On the 27th of the same month the testator and wife conveyed these lands to the petitioner for the consideration, as expressed in the deed, of \$1,080, to secure the payment of which petitioner executed a mortgage to the testator upon the same lands, conditioned for the payment of such sum in ten equal annual payments. This mortgage was fully paid by the petitioner, and was duly discharged July 11, 1864. George M. Howard transferred the two notes above mentioned to one Harry Howard, and subsequently the testator became indebted to Harry Howard, over and above the amount of these two notes, and shortly before his death caused the two original notes to be taken up, and the thirteen \$100 notes to be executed and delivered to Harry Howard.

The premises conveyed to the petitioner were worth much more than the consideration stated in the deed, and it is urged by the contestant that this circumstance, taken in connection with the fact that petitioner signed all these notes in form as a maker, justifies the conclusion that the indebtedness represented by the notes was primarily that of the petitioner. The evidence, although somewhat meager and unsatisfactory, in con-

sequence of the long lapse of time, falls far short of sustaining the claim of the contestant. It does not appear that the petitioner had any participation in the purchase and reconveyance of the lands from George M. Howard to the testator. The testator was the grantee and purchaser, and therefore the party naturally obligated to pay the purchase price. It does not appear directly or inferentially that such purchase was made for the benefit or at the request of the petitioner, nor that there was any connection between the conveyance of these lands from George M. Howard to testator and their conveyance by testator to petitioner, nor is there any satisfactory or sufficient proof that petitioner ever assumed this indebtedness as his own, or designed or intended to incur any other or greater obligation in connection with it than that of surety for the testator. Then, again, the evidence discloses a design in the mind of the testator to dispose of this land to some extent by way of an advancement. He first transferred it to his son, George, for an inadequate consideration, expressly declaring in the deed that it was by way of an advancement to him. He then took a reconveyance from George, giving him the two notes instead, and thereupon deeded the land to the petitioner. The petitioner and his family were just as naturally the objects of the testator's bounty as the son George. Petitioner had married the youngest daughter, and for several years had resided with his wife in the family of the testator, transacting his business and looking after and managing his affairs generally. When testator conveyed the lands to his son he expressly declared that such conveyance was in full satisfaction of the son's share in his estate. After the lands were reconveyed, the testator made his will, in which he named the son as one of the residuary legatees, making no provision whatever for his daughter, Deborah Kavanaugh, the wife of petitioner. If testator did not design the conveyance of these lands to Kavanaugh as an advancement upon his wife's share in the estate, but, on the contrary, expected him to pay the \$1,080 mortgage and the \$1,300 in notes as well, which would have equalled the total value of the land, then there is

no reason whatever apparent why testator should have excluded the daughter Deborah by the terms of his will from participating in the distribution of his estate. Moreover, the evidence distinctly shows that the testator regarded the indebtedness represented by these notes as his own, for, in conversation with several of his neighbors at various times shortly before his death, he spoke of this indebtedness to Harry Howard, unequivocally recognizing it as his own. By the terms of his will he makes a special provision regarding the management of his estate so as to meet and pay off this debt. In disposing of this question I have not lost sight of the well-settled rule that claims withheld during the alleged debtor's life, and sought to be enforced after his death, are to be carefully scrutinized (*Kearney v. McKeon*, 85 N. Y. 137), but from a thorough consideration of all the evidence I am unable to come to any other conclusion than that the indebtedness represented by the notes was solely and exclusively that of the testator.

The claim of the petitioner was not barred by the statute of limitations at the time of the commencement of this proceeding. Where the statute has commenced to run against a claim before the death of a decedent, the failure to secure the appointment of an administrator does not suspend the running of the statute. The only effect of the death in such a case is to extend the time in which an action must be brought (*Code Civ. Proc.*, sec. 403; *Sanford v. Sanford*, 62 N. Y. 553); but none of these notes had matured at the death of the testator, and no right of action accrued to the petitioner until he paid the notes in consequence of his liability as surety. The statute begins to run against the surety's right of subrogation only from the time he pays the debt. In such a case the time intervening between the maturity of the debt and the appointment of a legal representative of the estate is no part of the time limited by the statute. A cause of action cannot accrue or exist unless there is a person *in esse* against whom an action can be brought and the right of action enforced. In order to put the statute in motion,

there must not only be a person *in esse* to sue, but a person to be sued. *Sanford v. Sanford, supra*; *Davis v. Garr*, 6 N. Y. 124; 13 Am. & Eng. Enc. Law, 737.

No judicial settlement of the accounts of the administrator had been had before the commencement of this proceeding. Such prior accounting, however, is not a jurisdictional requirement. The earlier cases, holding that a judicial settlement should precede the commencement of proceedings for disposition of real estate to pay debts, were before the change in the statute regulating such proceedings. The law applicable to proceedings of this character has undergone various modifications. The original statute of 1801 authorized the personal representative to institute such proceedings whenever he discovered or suspected that the personal estate was insufficient to pay the debts.

The Revised Statutes of 1830 authorized such proceedings only when it was made to appear that all the personal property applicable to the payment of debts had been actually applied and was insufficient, leaving no discretion whatever on the part of the surrogate. This statute was amended by the Laws of 1837 so as to restore to the surrogate a discretion in the matter. This amendment provided that the surrogate might, in his discretion, order a disposition of the real estate, although the entire personal estate which had come into the hands of the representative had not been applied to the payment of the debts. The scope of the present statute (Code Civ. Proc., sec 2759) is quite clearly defined in *Kingsland v. Murray*, 133 N. Y. 175, where the court says:

“ But if the personal property left by the decedent at the time of his death was insufficient to pay his debts, or if the executors or administrators proceed with reasonable diligence in applying it to the payment of his debts, and it proves insufficient for that purpose, then, and then only, a case is made for the sale of the real estate. So, in the language of this section, before the surrogate can make a decree for the sale of the real

estate, the petitioner must establish that all the personal property of the decedent which could have been applied to the payment of the decedent's debts and funeral expenses has been so applied. If he establish that, then he need go no further, and the surrogate is authorized to make the decree. If he cannot establish it, but establishes the other alternative, that the executors or administrators have proceeded with reasonable diligence in converting the personal property into money, and applying it to the payment of the debts and funeral expenses, and that it is insufficient for the payment of the same, then, even if it has not all been so applied at the time of the petition, the surrogate is authorized to make the decree."

It would undoubtedly be much more satisfactory if a judicial settlement preceded the commencement of proceedings for disposition of real estate, as the decree would then show the extent of the personal estate and the disposition made of it; but, where no such settlement has been had, the petitioner assumes the burden of showing affirmatively, as a part of his application, the facts required by section 2759 of the Code.

In this case there is no pretense or suggestion that the testator left sufficient personal estate to pay his debts. What he did leave was consumed mainly in paying funeral expenses. Not a dollar of personal effects came into the hands of the representative. The exercise of the utmost diligence upon the part of the administratrix would not have disclosed the existence of any effects applicable to the payment of this debt. The fact that the claim of the petitioner is disputed does not deprive the Surrogate's Court of jurisdiction to determine its validity. *In re Haxtun*, 102 N. Y. 157; *People v. Westbrook*, 61 How. Pr. 138; *Kammerrer v. Ziegler*, 1 Dem. 177; *Hopkins v. Van Valkenburgh*, 16 Hun, 3.

It is urged by the contestant that the application of the petitioner should be denied in consequence of his long delay in instituting proceedings to establish his claim. The same question arose in *Hall v. Brennan*, 64 Hun, 394, where the court says:

“From the time of the death of George B. Bixby . . . until letters testamentary were issued upon his will, . . . there was no person in being against whom plaintiffs could have brought suit to enforce their claim upon their note against his estate. This was, in effect, a statutory prohibition, and such time was no part of the time limited for the commencement of an action. Code Civ. Proc., sec. 406; *Mead v. Jenkins*, 95 N. Y. 31; *Brehm v. Mayor, etc.*, 104 N. Y. 186; *Church v. Olendorf*, 49 Hun, 439, 444. It is no answer to this view to say that plaintiffs might have applied for a temporary administrator under section 2668, Code Civ. Proc. They could not procure such appointment as a matter of right. It is expressly made dependent on the discretion of the surrogate. The law did not require them to make the application under penalty of losing their debt.”

The delay in this case is, to some extent, explained by the pendency of the action, *Hogan v. Kavanaugh*, above cited, wherein the contestant in this proceeding was the plaintiff. The petitioner undoubtedly had the right of applying for letters of administration, with the will annexed, at any time after the probate of the will, but the contestant had a prior right to such appointment. She could have secured such appointment at any time, and, inasmuch as she neglected so to do, she is hardly in a situation to complain of the petitioner's neglect.

After the probate of the will of the testator the persons to whom the real estate described in the petition was devised quitclaimed their respective interest in such real estate to the petitioner, and it is urged that the petitioner, being the owner of such premises, is not in a situation to maintain this proceeding. Such claim is not tenable. The interests of the legatees in the real estate were subject to the rights and equitable interests of creditors. By their quitclaims to the petitioner they only transferred to him such interest as might remain after the satisfaction of the debts.

Application granted.

In the Matter of the Judicial Settlement of the Accounts of
JOHN GREGG, as Executor of ALMIRA GREGG, Deceased.

(Surrogate's Court, Madison County, Filed January, 1895.)

GIFTS—DECLARATIONS.

If the subject of an alleged gift is a debt of the donee, it must be established by instruments in writing; mere declarations of the testatrix that the debt was paid by services is not sufficient.

Judicial settlement of accounts of an executor.

C. Carskadden, for executor; H. B. Coman, for contestants.

KENNEDY, S.—Almira Gregg, the testatrix, died at the town of Stockbridge, in this county, on the 23d day of March, 1892, leaving an estate amounting to \$10,416.04. She left a will, in and by which, after a few specific legacies, she gave her entire estate to eight grandchildren, four of whom are children of John Gregg, the executor, the other four being children of her deceased son, David Gregg. Mrs. Gregg's husband died intestate, leaving considerable real estate; one of his farms, by some arrangement, becoming the property of said John Gregg. Having a dower interest in this farm, Mrs. Gregg and said John Gregg, on the 28th day of May, 1872, entered into a written agreement, under seal, which was duly acknowledged and recorded in the clerk's office of Madison county, in and by which she demised and leased to said John Gregg her undivided one-third interest in and to said land for and during the term of her natural life, and forever; said Gregg covenanting and agreeing to pay to her for the use of said premises, during the term of her natural life, the annual rent of \$150, to be paid in semi-annual payments of \$75 each, and, in addition thereto, all taxes that might be assessed thereon.

On the 6th day of July, 1886, she gave said Gregg a written power of attorney, authorizing him to transact all business that

she might need to have done, and containing also the usual general powers for the transaction of her business.

Upon this accounting, the contestant asks to have the executor's account surcharged with the rent of said farm to be paid under the lease since May 28, 1872, claiming that said Gregg never paid any rent to Mrs. Gregg, the amount now due being the sum of \$2,820 for rent, and the sum of \$2,185.77 of interest, computed at six per cent. from the time each payment became due, making a total sum of \$5,005.77.

The evidence on the part of Mr. Gregg does not show that he ever paid Mrs. Gregg any rent whatever, but he claims to have been released from legal liability thereon by Mrs. Gregg, and, for the purpose of establishing this defense, relies upon certain declarations of hers, which are, in substance, as follows: In January, 1881, she had a conversation with one Hamilton Lamb, in which she said to him: "You know it was wrong for John to give that contract to pay me so much a year, but we had to do it to get a settlement with David." That she gave John the rent each year for doing her business and looking after her, and that she should pay him further than that. In July, 1886, she said to her grandson, James A. Gregg, that John's doing her business released him from all rent of the farm to her or the estate. In June, 1890, she said to Ralph Gregg, another grandson: "I want you to write it down that rent of farm is paid in full each year by his looking after me and doing my business;" and told him to make a memorandum so he could swear to it, "for the girls will make him trouble some day; they have threatened it. I have not paid him enough for what he has done for me." In January, 1892, she said: "I have heard so much talk here that I want you to remember that all claims for rent for your father's farm is paid by his services." That Ralph Gregg said to her: "You had better give father a receipt for the rent," to which she replied: "He is empowered to give himself a receipt. He is my acting attorney."

In 1892 she said to the executor: "John, I want you to

understand you owe me nothing; that you have done more than the rent of the place;" that he had never had what he ought to have had from his father's estate. During her last sickness she said: "I tell you, and this may be the last time, there is nothing due from your place to me."

All these declarations were made to Mr. Gregg or to members of his family, and none are shown to have been made to other persons.

It is claimed on the part of the executor that the declarations above set forth release him from the payment of any rent that might otherwise be due upon the lease. We have no doubt that Mrs. Gregg intended to give the rent to her son, and supposed she had released him from liability upon the lease. She had sufficient means of her own to support herself, and it would be very natural for her not to insist upon the yearly payment of rent. But, notwithstanding these declarations, we do not think there was any valid release. The only way she could make the gift of her son's indebtedness to her valid and effective was to give him a receipt for the same, or something equivalent to it, from which the law would have construed the instrument as an assignment of the rent and of the right of action to Mr. Gregg.

So far, therefore, as the claim is made that the declarations of Mrs. Gregg amount to a release from the payment, we must hold that nothing was said or done to bring the case within the law as stated in *Gray v. Barton*, 55 N. Y. 68; *Ferry v. Stephens*, 66 Id. 321; *Beaver v. Beaver*, 117 Id. 421, and *McKenzie v. Harrison*, 120 Id. 260, which, we think, are controlling in this case. These cases hold that, where the gift is the debt of the donee, the donor must deliver to the debtor a receipt or some other equivalent instrument, in order to make the gift effective. The intention to make the gift is clear enough, but it was never executed, and the court cannot supply the absent fact which would make the gift certain and conclusive.

But it is claimed that Mr. Gregg is not liable upon the lease for the reason that Mrs. Gregg, in her several declarations, says

that the rent was paid each year by her son's services. An examination of the evidence does not disclose the services upon which to base such declarations. Upon the settlement of her husband's estate, her property consisted of \$5,000 in Oneida Valley Bank stock, which remained in her name until her death. She carried on no business. She had no business to transact, except to care for herself and pay the small expenses connected therewith. She was not lending her money to various persons or investing it in different enterprises. She simply drew her dividends, and, whenever the accumulations sufficiently accrued, invested them in other stock at Oneida. The only business which Mr. Gregg is shown to have transacted for her, outside of those filial attentions which are due from a child to a parent, is the purchase of some stock in the Oneida water-works, requiring no labor save drawing a check for the amount to be paid. We are unable to discover, during the existence of the lease, any foundation for the declarations relative to her business; for we do not find that Mrs. Gregg had any business about which, in the ordinary meaning of the word, services could be rendered. The facts do not seem to exist upon which it is claimed she bases her reason for the non-collection of the yearly rent. We assume that this is a case where the court will not inquire into the actual pecuniary value of services rendered Mrs. Gregg, and we have no doubt that Mrs. Gregg had the legal right to place her own estimate upon the value of the services of her son in the transaction of her business; and we should accept her valuation of them, and hold the rent to have been paid in the manner she declared it was paid, if we could find evidence that services had been rendered upon which it is claimed she based all her declarations relative to the payment of the rent. But all that we can find from the evidence, aside from some occasional act of slight importance, upon which Mr. Gregg can claim exemption, is the fact that he showed his mother that natural and filial devotion due to her, and which

she accepted in the kindly spirit with which it was offered and bestowed. For these she had the right to bestow upon her son the gift of the annual rent, and, if such attention to a parent could be legally classed under the name of services or business, we should accept Mrs. Gregg's estimate of their value, and hold that there was nothing due upon the lease; but believing the law to be otherwise, we must hold that the facts bring the case within the decisions of the courts above cited.

Had Mrs. Gregg commenced an action for the recovery of the rent, we apprehend that her declarations would not have been a defense to the claim. Mr. Gregg would have been obliged to show payment or services rendered for her equivalent to the amount due upon the lease. Her declarations could only have been used against her in corroboration of evidence of payment or services rendered on the part of the defense; and we think the same rule applies in this proceeding. Not having shown a valid gift within the authorities, nor any release from liability on his lease, his only other defense is to prove payment in some form. This he seeks to do by declarations which seem to us insufficient for that purpose.

In the settlement of estates there are constant claims of gifts coming before surrogates, supported generally by proof of declarations which the dead can neither admit nor deny nor the living disprove. It is therefore a safe and just rule of the courts to require evidence of the delivery of the gift to the donee if the property is capable of delivery, and, if the gift be a debt, that it shall be established by instruments in writing.

If we have stated the law applicable to the facts of this case correctly, the only duty remaining is to determine the amount of the claim against the executor which must be added to his account. Whether the surrogate has power to release from the large amount of interest found due upon the annual payments required to be paid by the terms of the lease may be doubtful; but in view of the evidence in this case, and the belief of each party that all had been done which was necessary to carry out

the object intended, we shall follow the direction of the court in *Livingston v. Livingston*, 4 Johns. Ch. 286, and hold that the computation of rent should be without interest, because of Mrs. Gregg's neglect to recover the same sooner. If this view of the law should be erroneous, this large amount of interest is amply sufficient to repay Mr. Gregg for any disclosed and undisclosed services which he may have rendered for his mother. Let a decree be entered accordingly.

Decreed accordingly.

In the Matter of the Judicial Settlement of the Estate of
JAMES BALL, Deceased.

(*Surrogate's Court, Orange County, Filed February, 1895.*)

WILL—VESTED ESTATES.

By testator's will a certain sum was given to the executor in trust to pay the income to one of testator's daughters during her life, and on her death to pay the principal to her children. A similar sum was given to each of his daughters. *Held*, that the gift to the grandchildren was absolute and vested at testator's death.

Judicial settlement of accounts.

The testator's daughter Eliza and her two children, Maggie and Carrie, survived him, and Maggie survived her mother, but Carrie died before, without issue, leaving her father, Theodore Pelser, her next-of-kin. The additional facts sufficiently appear in the opinion.

Abram F. Serviss, for the executrix of Theodore Ball, deceased; John J. Beattie, for the administrator of Carrie Pelser, deceased.

COLEMAN, S.—The question for determination in this case is the construction to be given the following clause of the testator's will:

"Sixth. I give and bequeath to my executor hereinafter named the sum of \$2,000, in trust to pay the interest thereof to my daughter, Eliza Pelser, during her natural life, semi-annually, and upon her death to pay the said principal sum of \$2,000 to her two children, Maggie and Carrie, share and share alike." Did the gift to Carrie at the death of the testator become vested or was it contingent upon her surviving her mother?

The testator died April 17, 1881, and his daughter Eliza Pelser died June 25, 1894, her daughter Carrie having died before her, in June, 1882.

There is no gift in terms to the testator's granddaughters, Maggie and Carrie, but, by a rule of construction, they take a bequest by implication. By another rule of construction, where the only gift is found in a direction to divide or pay over at a future time, the gift is future and not immediate; contingent and not vested. *Leake v. Robinson*, 2 Merc. 363; *Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 id. 92. This rule of construction is mentioned frequently in the decisions of the highest court of this State, and even so late as in *Miller v. Gilbert*, 144 N. Y. 68. It is, however, rarely applied, because the rule is made subordinate to the further rule that effect must be given to the apparent purpose of the testator as gathered from his whole will. As in the case of *Warner v. Durant, supra*, where it was held that "a severance of the gift instant from the general estate for the benefit of the legatee, and in the meantime the interest thereof is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed." So, also, in *Goebel v. Wolf*, 113 N. Y. 405; *In re Seebeck*, 140 N. Y. 241; *Dimmick v. Patterson*, 142 N. Y. 322; *Miller v. Gilbert, supra*, and many other cases. In all of these cases, for one reason and another, the court finds

in the will of the testator some provision which indicated to the mind of the court that the testator intended the legacy to vest. In fact, I have not found a case where the rule that a naked direction to divide or pay over is a contingent gift has been enforced after the case of *Smith v. Edwards*, 88 N. Y. 92.

The provision above quoted from the will of James Ball is the only one in the will having any reference whatever to this \$2,000, unless it is found in the gift of all the rest, residue and remainder of the testator's real and personal estate to his son, Theodore. This particular \$2,000 is set apart from the rest of his estate for the use of his daughter and her children, and no other provision is made for any of them. To another daughter, Sarah, he gives a like sum of \$2,000; also, to his daughter Mary \$2,000. To his daughter Juliette he gave \$1,500 only, but he gives to the children of that daughter \$500 more. So that we find in the will a provision for each daughter of \$2,000. To the other daughters than Eliza he gives it unimpressed with any trust, but the intention is quite clear that he intended his daughter and her children to receive eventually the same \$2,000 his other daughters received, not contingently upon a survival, but payment to the granddaughters being only deferred until the death of their mother.

The decree will, therefore, provide for the payment of Carrie's share to her legal representative.

Decreed accordingly.

In the Matter of the Judicial Settlement of the Accounts of
ANDREW STAFFORD, as Executor of WILLIAM MOORE,
Deceased.

(Surrogate's Court, Clinton County, Filed February, 1895.)

WILL—CONSTRUCTION.

The use of all testator's real and personal property was given to two sons for life, and the will then provided that "After the death of my two sons and their heirs, if they have any," the property was given to testator's brothers and sisters. *Held*, that it was testator's intention that only in the event of the extinction of lineal descendants the property should go to the collateral relatives, and that on the death of the sons the grandchildren took an absolute fee.

Judicial settlement of accounts.

W. C. Watson, for the executor; L. L. Shedden, for the heirs;
R. E. Haley, T. F. Conway and F. A. Smith, for the collateral
relatives.

BOOTH, S.—The testator, William Moore, on the 10th of March, 1883, executed his last will and testament, in which, after giving certain legacies to his brothers and sisters and other persons, he made the following disposition of his property:

"Seventhly. I give my two sons, Richard R. Moore and Alonzo S. Moore, both of Beekmantown, Clinton county, N. Y., the use and occupancy of all my real estate, and also the interest of my personal property, to be equally divided between them, share and share alike, to be paid them by my executors after the payments and bequests before stated are paid, said bequests to be paid them three years after my death. If the use and occupancy and the interest of personal property shall be insufficient to support my two sons, in that case I authorize my executors to use an amount of the personal property sufficient to support them as long as they live, or either of them. In case one of my sons above stated should die, the surviving one to

receive the whole use and occupancy of my real estate, and the interest of my personal property. After the death of my two sons and their heirs, if they have any, I give my real and personal estate to my sister, Susan Bullis, wife of Louis Bullis; my sister, Maria Roberts, wife of John Roberts; to my sister, Phoebe Oliver, wife of Henry Oliver, and to my brother, Amos Moore, of Plattsburgh, their heirs, intending the children of my sisters and brother to have the said real and personal property; if either of my sisters or my brother should die, I give the same to their children, share and share alike."

The testator, at the time of the making of the will, was about seventy-six years of age. He died on the 4th day of November, 1885, leaving surviving him his two sons, Richard R. Moore and Alonzo S. Moore, both of whom were unmarried. The will was duly probated on the 20th day of November, 1885.

Richard R. Moore died on the 17th day of August, 1889, leaving surviving no descendants, and unmarried.

Alonzo S. Moore, the other son, married on the 10th day of October, 1886, and died on the 13th day of September, 1894, leaving surviving a widow and two children, William L. Moore and Phoebe R. Moore.

Both of the sons of the testator being dead, a construction of his seventh clause of the will becomes necessary to determine in whom the personal property of the testator vested upon the death of Alonzo, and in such a case jurisdiction to construe the will attaches as incident to proceedings for an accounting and distribution. *Purdy v. Hayt*, 92 N. Y. 450.

It is clear that the testator gave to his two sons, during their lives, the use of both the real and personal property, the survivor to have the entire use and income of the same; and the only question remaining is whether, upon the death of the surviving son, Alonzo, his two children take the property, or whether it goes to the collateral relatives of the testator named in the seventh clause, and to their heirs. In determining this question several well settled principles are to be followed.

First. It is the duty of courts of justice to carry into effect the intent of the testator, so far as such intent can be collected from the whole instrument and is consistent with the rules of law.

As said in *Scott v. Guernsey*, 48 N. Y. 120: "The chief and only object of judicial construction, when applied to a will, is to ascertain and determine the intention of the testator."

It is evident that the will was drawn by a man ignorant of the technical rules relating to the creation of estates and the words necessary or appropriate to their creation, and, as said in *Lytle v. Beveridge*, 58 N. Y. 598: "Of such a will, above all others, it is the duty of the court to be astute in discovering and giving effect to the actual intent of the testator, as the same may be spelled out from the body of the instrument, read in the light of the surroundings and relations of the author, and the circumstances in which he was placed, and, so far as may be, unembarrassed by technical rules of construction. . . . The doctrine that the intent of a testator is the guiding and controlling rule of interpretation requires, not infrequently, a disregard of the usual technical meaning of words and phrases, and, when necessary, such technical meaning must yield to the evident intent of the testator. Rules of construction are resorted to as helps or aids in arriving at the intent of a testator, and ought not to be followed when they lead to results subversive of such intent. There is no rigid rule of law to the effect that words shall only be used in one certain sense, or requiring courts to give language the same interpretation and effect under all circumstances and in every connection."

Second. Another principle to be followed is that the law favors a construction which will not tend to the disinheritation of heirs. That meaning is to be preferred, if the case were balanced, which inclines to the side of the inheritance of the children of a deceased child. *Scott v. Guernsey*, *supra*; *In re Brown*, 93 N. Y. 295; *Vanderzee v. Slingerland*, 103 N. Y. 54.

Indeed, in *Lynes v. Townsend*, 33 N. Y. 561, the court

states that it is one of the "established and well-known canons applicable to the construction of all wills that the heir is not to be disinherited without an express devise or necessary implication, such implication imputing not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed."

Again, in *Quinn v. Hardenbrook*, 24 N. Y. 86, it is said: "The rule is peremptory that the heir shall not be disinherited, unless by plain and cogent interference arising from the will."

I deem it further settled that the word "heir," as used in this clause of the will, refers to the heirs of the body, the lineal descendants of the two sons. *Bundy v. Bundy*, 38 N. Y. 419; *Thurber v. Chambers*, 66 id. 47; *Smith v. Scholtz*, 68 id. 59.

Applying these principles, what was the intent of the testator? The words, "after the death of my two sons and their heirs, if they shall have any," must have been used for some purpose. The construction asked for by the counsel for the collateral relatives would practically blot these words out of the will.

At the time of the making of the will the testator was an old man, and his brother and sisters were also old, and owned farms and property of their own. His two sons were living with him, and in good health. They had no property other than what their father gave them by his will. He was fond of them. In his will he had already made provision for his brother and sisters, and it was evident from the ages of these brother and sisters that they must in all probability be dead before the death of the two sons. In the event of their death, the property, according to the contention of the counsel for the collateral relatives, would descend to the children and grandchildren of the deceased brother and sisters of the testator. I cannot believe that the testator intended to disinherit the heirs of his own body for the purpose of giving the property to his brother's and sisters' children and grandchildren, whom he had never seen or known, and some of whom were not in existence. The language of the will, "After the death of my two sons and their heirs, if they

have any," clearly shows the intent to be that, if these sons had children their children should take the property, and only in the event of the extinction of the testator's lineal descendants should the property go to the collateral heirs. The heirs of his sons take what would go to the brother and sisters if there were no heirs, viz.: the *corpus* of the property in fee.

The case is one of an estate created, not by express or direct gift, but inferred from language which shows an intention to give the estate, and can have no other reasonable explanation. The authorities cited by the counsel for the two children are conclusive to my mind that the two children of Alonzo take the entire property absolutely in fee.

In the case of *Prindle v. Beveridge*, 7 Lans. 225, one clause of the will was as follows: "I allow my son Joseph to possess by devise of will the farm I now live on during his natural life; but, if he leaves no legitimate heirs, then the property is to revert" to another son. In the opinion, at page 228, the court says: "The authorities seem to favor the position that by implication the farm was devised to the legitimate heirs of Joseph." And in the opinion affirming this case, in 58 N. Y. 605, the court say: "The law would imply a devise in fee to the children of Joseph living at the time of his death, and thus give effect to the intent to provide for them in case any should be left by—that is, who should survive—Joseph, the first taker, and to limit the estate of Joseph to a life estate, and carry the remainder to David upon the happening of the contingency." See, also, *Matter of Vowers*, 113 N. Y. 571; *Marsh v. Hague*, 1 Edw. Ch. 180.

We believe the construction given is required by the terms and general scope of the will and manifested express intent of the testator, and is warranted by all well-established principles relating to the construction of wills.

Having reached this conclusion, it is unnecessary to pass upon the other questions raised by the counsel for the collateral heirs.

No question is raised on this accounting as to the correctness

of the account of the executor, or as to any other part of the will, except in the legacy of \$200 to Maria Roberts, a sister of the testator. She died during the lifetime of the testator, and, not being a descendant of the testator, the legacy therefore lapsed, and her heirs are not entitled to it.

I therefore order that a final decree be entered settling the accounts of the executors as filed, and directing that the income of the entire property accrued at the time of the death of Alonzo be paid over to the executor of the will of Alonzo, and that said decree further direct that William L. Moore and Phoebe R. Moore, the infant children of Alonzo S. Moore, are each entitled to one-half of the balance of the personal property, principal and interest, and that the same be paid over to the general guardian of said infants; that the costs and expenses of the executor in these proceedings and the fees of the special guardians of the infants be paid out of the estate, and the counsel for the two children be allowed costs, payable out of the estate.

Ordered accordingly.

In the Matter of the Application for Letters Testamentary
with the Will Annexed of ANN OWENS, Deceased.

(Surrogate's Court, New York County, Filed February, 1895.)

ADMINISTRATION—CHARITABLE DEVISES.

A devise to "the Sisters of Charity attached to" a certain church, where the body named is not incorporated, cannot be sustained on the theory that it is given to the individuals composing such body, so as to entitle one of them to letters of administration.

Application for letters testamentary with the will annexed of Ann Owens, deceased.

Henry Cooper, for petitioner.

ARNOLD, S.—This is an application by one Mary Lavelle for letters testamentary with the will annexed, both the executors named in the will having died. It is stated that there is some personalty, to a small amount, yet unadministered upon.

Petitioner is a niece of the testatrix, and the only one of her next of kin residing in this State. Section 2643 of the Code gives the preference upon similar applications to legatees under the will, then to the next of kin. No application on the part of any legatee has been made, but the citation here has issued to and been served on all the surviving legatees, or they have appeared in this proceeding.

The only opposition to the application is made by a person claiming to be one of "the Sisters of Charity attached to St. Lawrence Catholic Church," who asserts a prior right to such letters. By the terms of the will the testatrix devises her whole estate, after the decease of her only child, who died, as it happened, a few days before the date of the testatrix's own demise, in equal parts, one to St. Lawrence Catholic Church aforesaid, one to the Sisters of Charity attached to said church, and the third to the Little Sisters of the Poor. It is conceded that the Sisters of Charity attached to St. Lawrence Catholic Church are not incorporated, and it is contended that the devise must be construed as applying to the persons answering the description given as individuals; but, on the other hand, it is insisted that the devise is to an unincorporated association, which has not power by law to take it. I am of the opinion that the latter is the correct position, and that it was manifestly not intended by the testatrix to give a large portion of her estate to such individuals as at her decease—an indefinite and unfixed period—should happen to be Sisters of Charity, and attached to St. Lawrence Church, or should answer that description at the date of the will; but that the devise was to the Sisters of Charity attached to the church as a body, and for charitable and not personal purposes. It has been very frequently held that, for the purpose of passing upon applications of various kinds which

he is empowered by statute to entertain and decide, the surrogate has authority to construe the terms and provisions of testamentary instruments. *Susz v. Forst*, 4 Den. 348; *In re Wheeler*, 46 Hun, 64; *In re Fernbacher*, 4 Dem. 227; *In re Wood's Estate*, 15 St. Rep. 722; affirmed 7 N. Y. Supp. 836, and 119 N. Y. 660.

I should not deem the fact that the individuals answering the description in question were ordered to be made parties defendant as such, in an action for partition of the decedent's real estate, should govern this court upon the present application, as they might have been brought in simply for greater caution, and to obtain a judgment on the very point in controversy which would be conclusive on them. And it appears that in another action for partition in the Supreme Court an application to make the individual "Sisters" in question parties to a suit involving real estate, in which their own possible interest was derived under the same will, was denied. In this matter it is necessary that the application of the petitioner should be granted or denied, and the disposition of the matter calls for a construction of the will as to who were intended by the testatrix, by the terms used by her, as her legatees.

I do not think that any one or more of the persons who may answer individually to the description of a Sister or Sisters of Charity attached to St. Lawrence Catholic Church is entitled to letters of administration herein, and, as the relationship of the applicant to the decedent as claimed by the former is conceded, she is entitled to the letters asked for.

Decree for letters to the petitioner as prayed for is ordered.

In the Matter of the Probate of the Will of WILLIAM GEE,
Deceased.

(*Surrogate's Court, New York County, Filed February, 1895.*)

SURROGATES—DEPOSITIONS.

A surrogate has power to order the examination of an aged, sick or infirm witness who resides in another county, other than a subscribing witness to the will, to be taken before a referee in such county.

Proceeding for the probate of a will.

Edward S. Clinch, for proponent.

ARNOLD, S.—This is an application on the part of proponent for an order directing the examination of a witness residing in Greene county, in this State, to be taken before a referee in such county. I entertain no doubt of the power of the surrogate to make such order. Section 2539 of the Code prescribes the practice where a witness who is aged, sick or infirm cannot attend before the surrogate in whose county the proceeding is pending. Section 2540 provides for cases where the disabled witness is in another county, and this, not being an application for the "examination of a subscribing witness to a will," comes within the category of "other cases" in which a referee may be appointed. The decision in *Re McCoskry*, 10 Civ. Proc. R. 178, is not only not in conflict with this view of the subject, but entirely in harmony with it.

The affidavit presented is not very explicit as to materiality of the evidence expected to be elicited from the witness, but, having supplemented it by an examination of the testimony of the subscribing witnesses, who fail to prove the execution of the will, there is enough to satisfy me that the testimony now sought may be material.

The provision with respect to the transmission of the will to the referee for use on the examination should not ordinarily

be granted, but as the conflicting interests in this estate seem to be fairly represented, assuming the executor to be, so far as the papers and proceedings indicate, entirely disinterested, and all the attorneys, as well as the special guardian, not only consent to but urge the granting of the application, that provision may remain with a slight amendment.

Order as amended signed.

In the Matter of the Estate of JACOB BASCH, Deceased.

(Surrogate's Court, New York County, Filed March, 1895.)

EXECUTORS—DISCOVERY.

If a person cited to appear for examination as to property in his possession alleged to belong to the decedent files a verified answer claiming the ownership or right of possession by reason of a lien or special property therein, the surrogate is thereby ousted of jurisdiction, and the examination cannot be continued for the purpose of procuring the disclosure of knowledge or information as to such property which the witness may have.

Proceeding to discover personal property alleged to belong to the estate of the decedent.

James Fromme, for respondent.

ARNOLD, S.—This is an application by the public administrator for an examination of the respondent touching certain personal property in her possession, which he alleges upon information and belief belonged to the decedent. A citation and order having been granted and served upon her, the respondent appears and files a verified answer, claiming to be "the owner of each and every item and article of property in said petition enumerated," and thereupon asks, by virtue of the provisions

of section 2709 of the Code, for a dismissal of the proceedings. The public administrator, conceding that the issues made by the petition and answer cannot be tried in this court, and that no order for the delivery of the property in question can be made, nevertheless claims the right to proceed with the examination of the party for the purpose of procuring the disclosure of any knowledge or information concerning the property which she may have.

The proceedings for discovery by the public administrator are regulated, where he is acting under letters of administration granted to him by the surrogate, by the provisions of the Code. *In re Elias*, 4 Dem. 139. The purpose of these provisions is to enable the legal representative of an estate to obtain possession of property belonging to it which is withheld from him. Two classes of persons may be cited—those who have possession or control of the property in question, and who can therefore deliver it if required so to do, and those who only have knowledge or information concerning it. Section 2707, Code. If on the return day the person cited interposes a written answer, duly verified, that he is the owner of the property or entitled to its possession by virtue of a lien thereon or special property therein, the surrogate must dismiss the proceedings as to such property so claimed. If no such claim is made as so provided, the examination must proceed. The result is that, where claim of title is interposed, the surrogate is ousted of jurisdiction, and cannot decide the question raised, the parties being remitted to another tribunal, wherein a jury trial or other proper and constitutional disposition of the issues may be had. If no claim is made to the title or possession of the property, a full inquiry is allowed for the purpose of ascertaining what knowledge or information the person cited has as to the property.

In this case the party comes before the court and files a written and verified answer, claiming absolute ownership of all the property in question. Under such circumstances, no examina-

tion is permissible, and if it were allowed no order could be made for the delivery or disposition of the property based upon it. The provisions of the statute are peremptory, to whichever of the two classes mentioned the party cited may, upon the face of the petition, belong. It is true that section 2709 provides that the proceedings shall be dismissed as to the property claimed, but that is meant to cover a continuance as to such property mentioned in the petition as is not claimed by the answer. If there be any such, and the answer admits possession or control, as well as ownership by the estate, suitable provision may be made for its delivery to the legal representative. If full concession in these respects is not made, then the party must submit to full examination as to what he knows or has been informed as to such part of the property described in the petition to which he asserts neither title or lien nor special interest. Here the ownership of all the property is claimed in hostility to the public administrator, as legal representative of the intestate.

The proceedings are dismissed.

In the Matter of the Estate of WILSON G. HUNT, Deceased.

(Surrogate's Court, New York County, Filed February, 1895.)

GUARDIANS—BOND.

An ancillary guardian who is also the general guardian, and as such has given the bond prescribed by section 2839 of the Code, is not required to give the bond prescribed by section 2746 in order to entitle him to receive legacies due to his wards.

Applications by an ancillary guardian of minor legatees for an order requiring the executors to pay over legacies due the wards.

Parsons, Shepard & Ogden, for ancillary guardian.

ARNOLD, S.—Applications are made by the guardian of certain infants to whom ancillary letters have been granted by this court for the payment to it of legacies given by the will of Wilson G. Hunt to said wards. There is no opposition made, further than that the executors claim that it is doubtful whether they can safely make such payments until or unless the ancillary guardian gives a bond similar to that required under like circumstances from a domestic guardian, under section 2746 of the Code.

The ancillary letters were granted, upon proof, among other things, that the applicant for same was the duly appointed general guardian of the minors, and had given the security described in subdivision 1 of section 2838. It is to be assumed that such security was directed and given for the whole of the infants' estates, including the legacies in question. While under the like conditions a domestic guardian would have to give an additional bond, it does not follow that the ancillary guardian must do so; and, unless there is some express or implied requirement of law calling therefor, it should not be required of it. I do not find any such requirement; but, on the contrary, section 2840 of the Code expressly provides that ancillary letters, if granted, shall be issued without security, and the ancillary guardian shall thereupon be authorized to demand and receive the personal property of the ward, and may remove same from the State. The receipt of the ancillary guardian in this case will be a full protection to the executors in paying over to it the legacies here in question.

Application granted.

**In the Matter of the Appraisal Under the Taxable Transfer
Act of the Estate of MONROE WESTCOTT, Deceased.**

(Surrogate's Court, Otsego County, Filed March, 1895.)

TRANSFER TAX—REMAINDER.

Where the remainder after a life estate is made contingent upon the remainderman surviving the life tenant, with a limitation over in case of his not doing so, the interest of the remainderman is not presently taxable, and the appraisal thereof should be adjourned until his rights become actual and fixed.

Appeal by Elizabeth Pope Westcott and Cora P. Gannung, as executrices of the will of Monroe Westcott, deceased, and by Cora P. Gannung individually, from the decree of the Otsego County Surrogate's Court, entered on the 20th day of December, 1894, confirming the report of the appraiser appointed under the Transfer Act to appraise the property of said decedent for the purposes of taxation.

Maynard & Gilbert (F. R. Gilbert, of counsel), for appellants; Frank L. Smith, district attorney, for county treasurer.

ARNOLD, S.—This appeal brings up for review the proceedings had herein under the Taxable Transfer Act, to wit, the appraisal and report of the appraiser, and the order of the surrogate confirming the report of the appraiser, and assessing the tax to which the several legacies passing under said will were liable.

The tax on the legacies given by the fourth and fifth clauses of testator's will, it is conceded, was properly assessed, and in disposing of this appeal it is not necessary to consider more than the sixth clause of the will, which reads as follows:

"Sixth. I devise and bequeath the use of all the residue and remainder of my real estate to my wife, Elizabeth Pope Westcott, so long as she shall live, except what may be necessary to

keep in repair; at her death I direct that all the property left shall be under the control of Dr. Cora P. Gannung, for the purpose of establishing and founding a hospital in the corporate limits of Oneonta, to be known as the 'Munro Hospital,' to be managed and run under the direction of the said Dr. Cora P. Gannung; and she shall receive out of the rents and profits of said property so left the sum of (\$1,000) one thousand dollars each year during her life for her services as sole director of said hospital. This property is left as an endowment fund, the use of which only may be used each year for the best good of said institution. And in case any contributions shall be made by others for buildings or for furthering the interests of said hospital, it may be accepted upon condition that the said Cora P. Gannung may associate with her any person or persons to be directors in said hospital.

"But should the time ever come that her wishes, or the wishes of the person or persons that she may name as directors, cannot be carried out, I direct that all this endowment fund shall be withdrawn from said hospital, and the use thereof shall belong to Dr. Cora P. Gannung for her lifetime, after keeping said property in repair, and at her death it shall go to Munro Lee Evans, oldest son of George O. Evans; and should he not be alive it shall go to the children, equally divided, of George O. Evans, Morris Evans and Leon Evans, then living, except one thousand dollars to each of the children of Dr. Cora P. Gannung then living. Should George O. Evans, Morris Evans, and Leon Evans, any or all of them, die, and leave no children, in that case their shares they have the use of be and become a part of the endowment fund for said hospital, upon the same conditions as the other funds."

Stripping this clause of testator's will of all reference to the institution to be known as the "Munro Hospital," the testator gives to his wife, Elizabeth Pope Westcott, a life estate in the remainder of his real estate. On her death he gives a life estate in the same to Cora P. Gannung. On her death he gives the

remainder to Munro Lee Evans, if he be then living. If he is not living at that time, then such remainder is given to certain other persons.

Proceeding under chapter 713 of the Laws of 1887, the law in force at the time of testator's death, the appraiser has, by means of the methods and standards of mortality and of value which are employed by the superintendent of the insurance department, appraised the fair market value of the devise to Cora P. Gannung at \$4,550.70, and the surrogate has fixed the tax due thereon at \$227.54.

The appraiser has also appraised the fair market value of the devise to Munro Lee Evans at \$12,091.09, and the surrogate has assessed the tax due thereon at \$604.55. Under the decision of the Court of Appeals in *Re Hoffman's Estate*, reported in 143 N. Y. 327, it is very clear that the devise to Munro Lee Evans is not presently taxable. This leaves but one question to be disposed of here, viz.: Is the devise to Cora P. Gannung presently taxable?

The Act of 1887 provides that the appraiser shall appraise the estate subject to the tax at "its fair market value," and from the appraiser's report "the surrogate shall forthwith assess and fix the then cash value of all estates, annuities, and life estates or terms of years growing out of the said estate, and the tax to which the same is liable."

Can "the fair market value" of this devise to Cora P. Gannung be found by the appraiser, and its "cash value" be fixed by the surrogate at the present time? Mathematically it can; otherwise it cannot. Cora P. Gannung may die before her mother. This contingency is not named in the will, but what difference can that make as to the disposition of this case? It exists the same as though named, and the decision of the Court of Appeals in the Hoffman case decides the present taxability of the devise to Cora P. Gannung.

By the Hoffman will the mother took a life estate; on her death, by the terms of the will, Ella A. Sanford took a life

estate, if she survived her mother. If she did not survive her mother, then on the death of her mother the remainder went to the issue of her daughter, etc. Here Mrs. Westcott takes a life estate. If, upon her death, Cora P. Gannung survives her (if we do not consider the provision of the will relating to the Munro Hospital), she takes a life estate, and on her death the remainder goes to Munro Lee Evans, etc.

The estates devised to Ella A. Sanford and Cora P. Gannung, by these respective wills, are subject to exactly the same contingency. In the event of the death of Cora P. Gannung before the death of her mother, as is said by the Court of Appeals in the Hoffman case, "there will have been no actual transfer to her of any of the property of the decedent. She ought not to be taxed until events make it certain that there is an actual and beneficial transfer of the property to her."

It is very true that the estate devised to her comes within the statutory definition of a "vested remainder," but it is very different from a case where the will gives a life estate to A. and the remainder to B. and his heirs. At the present time she has no estate that she could sell to any one at any price, unless it might be to the most daring speculator.

There must be an adjournment of the taxation of the devise to Cora P. Gannung until the death of Mrs. Westcott, and there must be an adjournment of the taxation of the devise to Munro Lee Evans until the rights of the parties entitled to that devise become fixed and actual. These devises are not presently taxable.

Let a decree be entered modifying the decree appealed from accordingly.

Decreed accordingly.

In the Matter of the Accounting of the Trustees for THOMAS
CORLIES Under the Will of EDMUND W. CORLIES, Deceased.

(*Surrogate's Court, Kings County, Filed March, 1895.*)

SUSPENSION OF ALIENATION—VALIDITY.

The provisions of a will as to the suspension of the power of alienation and of absolute ownership are valid to the extent of two lives in being at testator's death, although testator has attempted to accomplish a further suspension, or to make any other unlawful disposition of the remainder.

Accounting by testamentary trustees.

Butler, Stillman & Hubbard, for trustees; Thomas B. Hewitt, for Mary A. Corlies, widow; James McKeen, special guardian, in person.

ABBOTT, S.—Edmund W. Corlies died on the 5th day of February, 1890. He left him surviving his widow and five children, three sons and two daughters. He left a last will and testament.

By the fourth paragraph of his will he bequeathed to his executors \$100,000, in trust, to collect the income thereof and pay the same to his widow during her life. Upon her death this fund of \$100,000 was to become a part of testator's residuary estate.

The testator disposed of his residuary estate as follows:

"Sixth. I give, devise and bequeath all the rest, residue and remainder of my estate to my executors, or to such of them as may qualify and take upon themselves the execution of this will, *in trust*, to divide my said residuary estate into as many equal parts or shares as I may leave children surviving me, one share to represent each child, and to securely invest the principal of every such share in trust for the benefit of the child whom it represents, and to collect and receive the income arising there-

from, and to apply the said income as fast as received to the use of the child whom it represents, if a minor, during the minority of such child, so far as may be necessary, and any excess of income not required for such purpose shall be added to the principal of such share during the minority of such child. In the case of a child who has attained the age of twenty-one years before my death, or when any child attains the age of twenty-one years, the entire income of the share of such child shall thereafter be paid to him or her as it is received during his or her natural life.

"I further authorize and empower my said executors, in their discretion, and that of their survivors or survivor or successor, to advance to any one of my sons after he shall have attained his majority, upon his written request, and at any time, the whole or any part of the share in the principal of my estate representing such son. Such discretion shall be exercised by my said executors in view of all the circumstances which, in their judgment and experience, ought to be considered, it being my intention to repose such discretion in my said executors as shall give my said sons the benefit of their judgment, whether, all things considered, it is best to retain the whole or some portion of their respective shares in trust, or to place the same in their absolute control.

"I further authorize and empower my said executors, in the exercise of a like discretion as above, to advance to any one of my daughters, being of full age, upon her written request, out of the share representing such daughter, a sum or sums not exceeding in all twenty-five thousand dollars. And in every case the receipt of any son or daughter for the sum so advanced shall be a full and complete discharge of my executors in respect thereto.

"And, on the death of my said wife, the principal sum of one hundred thousand dollars, constituting the trust fund for her benefit, as directed in the preceding fourth article of this article of this will, shall be equally divided into as many parts

as I shall leave children at my death, and be added to the shares of said children respectively, and disposed of in like manner as hereinbefore divided in respect to the several trusts created for the benefit of my said children.

"Seventh. In case of the death of any child of mine leaving lawful issue, such issue shall stand in the place of and represent their deceased parent, and take the share representing such parent remaining in the hands of my executors and trustees, with all accumulations and income thereon, in equal proportionate parts; and, in default of issue, the share remaining in the hands of my executors and trustees of any child so dying, shall fall into and become a part of my residuary estate."

One of the testator's sons, Thomas Corlies, has died without leaving any issue surviving him. He was more than twenty-one years of age at the time of his decease. The trustees of the last will and testament had not made any advances to him out of the capital of the estate, in the exercise of the discretion vested in them by the sixth paragraph of the will.

The trustees now seek the instruction of this court, in their accounting proceeding, as to the disposition which shall be made by them of the one-fifth share of the residuary estate set apart by them for the benefit of testator's deceased son Thomas.

I am of the opinion that the issues involved in this proceeding do not call for a general construction of all the provisions of the will and the present determination of the ultimate disposition which shall be made by the trustees of the respective trust funds in their hands. In fact, I seriously question the power of the surrogate to make such general construction at this time.

I do not understand that the validity of the provisions of the will is questioned by any of the parties to this proceeding, in so far as such provisions relate to the original trust fund set apart for the benefit of the widow and children, respectively, during their respective lives, or that there is any claim of right to an immediate and final distribution of any of the trust funds

among the testator's widow and next of kin, except that set apart for the benefit of testator's deceased son, Thomas. Even if such claim be made, it is utterly untenable. *Purdy v. Hayt*, 92 N. Y. 447; *Tiers v. Tiers*, 98 id. 568. While these decisions both relate to real property, the principle there laid down should be extended by analogy to dispositions of personal property. In fact, the principle was recognized as applicable to personal property in *Knox v. Jones*, 47 N. Y. 389, 398. See, also, *Henderson v. Henderson*, 113 id. 1-15.

We are thus brought at once to the consideration of that portion of the will which provides for the disposition of the share of the residuary estate of a child who dies without issue.

"In default of issue, the share remaining in the hands of my executors and trustees of any child so dying shall fall into and become a part of my residuary estate."

The "share" here referred to is the original share set apart, less any sums which may have been advanced in pursuance of the discretion granted to the trustees by the sixth paragraph of the will. It may also include any income accumulated thereon during the minority of the child representing such share. *Vanderpoel v. Loew*, 112 N. Y. 167.

Referring, again, to that portion of the will which makes disposition of the residuary estate, we find that the residue is given to the trustees in trust to divide into shares, collect and receive income, and pay over the same to adult children, and apply to support and maintenance of minor children during their respective lives.

Therefore, upon the decease of Thomas without issue, the share of the residuary estate set apart for his benefit again fell into the residuary estate, to be disposed of as provided in the will. It passed again to the trustees, in trust, "to divide . . . into as many equal parts or shares as I may leave children," etc.

An utterly absurd construction of these provisions of this will

must not be adopted, although in accord with its literal and exact language.

Such an absurdity would be involved in the subdivision of Thomas' share into five parts, the number of testator's children surviving him. The evident intention of the testator was to provide for his children and their issue to the extent of the full amount of his residuary estate, and, in the event which has happened in the case of Thomas, that testator's children and their issue should still enjoy the entire residue.

So long as such evident intention is lawful, and does not violate any provisions of the statutes of this State, it must be carried out by the trustees.

To the extent of at least two successive lives in being at the date of the death of the testator, the provisions of his will which provide for a suspension of absolute ownership of personal property and the power of alienation of real property are valid, whether or not the testator has attempted to accomplish a further suspension or to make any other unlawful disposition of the remainder. *Purdy v. Hayt, supra; Tiers v. Tiers, supra; Henderson v. Henderson, supra.*

Applying the test of lives in being at the testator's death to the effect of the subdivision of Thomas' share, we find that the suspension as to the entire share of Thomas has already extended through Thomas' life. That share is now to be subdivided into four parts, and the suspension as to each subshare may continue during the life of the person for whose benefit it shall be set apart, without doing violence to the statute against perpetuities.

In the event of the death of a second child of the testator without leaving issue, it will become necessary to determine the ultimate and final ownership of the accretion to his share from the share of Thomas. As to such subshare, the limit of two lives will then have been reached, and a final distribution thereof in absolute ownership must be made. But, until such contingency happens, it is unnecessary to decide this question.

I am of the opinion that, upon this accounting, it is the duty of the trustees to subdivide the one-fifth share of Thomas into four equal parts, and to hold one such equal part or subshare for the benefit of each of the surviving children of the testator, upon the same trusts and for the same purposes specified in the sixth paragraph of testator's last will and testament.

I can see no objection to a statement in the decree that the same is made without any prejudice to any rights of the widow, Mrs. Corlies, under chapter 452 of the Laws of 1893.

Decreed accordingly.

**In the Matter of the Application for Letters of Administration
on the Estate of HENRY D. BROOKMAN, Deceased.**

(Surrogate's Court, Kings County, Filed March, 1895.)

WILL—REVOCATION.

Shortly before his death, testator had differences with his brother, which he settled by conveying to him real estate which he had devised to one of his daughters. With the will was found a codicil, written partly upon it, which simply modified it in a few particulars, and was evidently intended to readjust said daughter's share, but the signature to such codicil was erased by testator by drawing ink lines through it. *Held*, that the will was thereby revoked.

Application for letters of administration.

Hand, Bonney, Pell & Jones, for petitioner.

ABBOTT, S.—Henry D. Brookman departed this life in the city of Brooklyn on the 10th day of February, 1895. In pursuance of an order of this court, his box in the Mercantile Safe-Deposit Company in the city of New York was opened, with a view to discovering whether the deceased had left any last will

and testament, and in said box, among a bundle of canceled and worthless papers, was found a paper purporting to be a will dated July 23, 1879, and a codicil dated June 16, 1883. The codicil began on the same sheet of paper upon which the will ended, there being only a short blank space between the end of the will and the beginning of the codicil, and both instruments were securely tied together in one cover. When so discovered at the said safe-deposit company, the signature of the deceased to such codicil was found to have been erased by being crossed out in ink lines, and with the following memorandum, in the handwriting of the decedent, alongside the canceled signature: "May 20, '92, void, H. D. B."

This is an application, concurred in by all the next of kin, for the granting of letters of administration to the widow, on the ground that the deceased died intestate, and a careful review of all the circumstances surrounding this case leads me to the conclusion that the application should be granted. Our statutes provide that a will may be revoked by being "burnt, torn, canceled, obliterated or destroyed, with intent and for the purpose of revoking the same by the testator" (2 Rev. St. p. 64, sec. 42; Birdseye's Rev. St. 3343); and the law is well settled that a testator may cancel and revoke his will by drawing ink lines through the signature *animo revocandi*. *In re Philp's Will*, 19 N. Y. Supp. 13; 46 St. Rep. 356.

The question before this court is, did the deceased intend to revoke the will as well as the codicil when he canceled his signature to, and made the memorandum upon, the codicil, and did his action revoke the whole or only a part of the instrument?

I have been unable to find any case bearing upon this precise question, but some English cases pass upon the converse of this proposition, and the reasoning therein employed, I think, may be held applicable to this case.

Thus, when a testator had destroyed his will, but not the codicil, it was held that the codicil, being dependent upon and inseparably blended with the provisions of the will, was revoked

also, and that surrounding circumstances must be taken into consideration in solving the question whether the testator intended to revoke the whole or only part of the instrument.

Sir JOHN NICHOLL says, in *Medlycott v. Assheton*, 2 Addams Ecc. 229-231:

"A codicil is *prima facie* dependent on the will, and the cancellation of the will is an implied revocation of the codicil. But there have been cases where the codicil has appeared so independent of and unconnected with the will that, under circumstances, the codicil has been established, though the will has been held invalid. It is a question altogether of intention. Consequently, the legal presumption in this case may be repelled; namely, by showing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, however, the circumstances of this case are not sufficient to establish such an intention in order to repel the legal presumption. The codicil in this case appears connected with the will, for the principal legatees in the codicil are "her two trustees," being such under the will, and, the will being revoked, they no longer retain that character. Even the distribution of the trinkets, made by the codicil, might be influenced by the disposition contained in the will. . . . Under these considerations, I am of opinion that the legal presumption of the codicil being revoked by the cancellation of the will is not sufficiently repelled by circumstances showing a different intention in the testatrix, and, consequently, that she must be pronounced to be dead intestate." See, also, *Choppin v. Dillon*, 4 Hagg. Ecc. 369; *Schouler Wills*, sec. 400; 1 *Jarm. Wills*, 139; 1 *Redf. Wills*, 316.

This will and codicil must be taken as one instrument, and both together considered as the will of the deceased. *Brown v. Clark*, 77 N. Y. 369-378; 2 *Rev. St.* p. 68, sec. 71; *Birdseye's Rev. St.* 3345.

The codicil simply modifies the will in a few particulars, and, as modified, in all respects ratifies and confirms it. The codi-

cil, standing alone, as a separate instrument, would utterly fail to make an intelligent or total disposition of this estate, and would not be a legal entity, independent of the existence of the will. The provisions of the codicil are inseparably blended with those of the will, and the act which revoked the codicil must, under the circumstances of this case, have been intended to revoke the will also.

There are other circumstances which render it impossible for me to escape from the conclusion that Mr. Brookman intended to revoke the whole instrument.

The scheme of the will and codicil was, after providing for the widow, to divide the rest of the estate, as equally as possible, between his three children; and in carrying out this scheme he devised to each of them a life estate, coupled with certain testamentary powers in valuable parcels of land then owned by him; and one necessity for having any codicil executed was to readjust one child's share, which had declined in value since the making of the will.

In the year 1892, shortly before making the memorandum and canceling the signature upon the codicil, the hitherto friendly relations which had existed between the deceased and his brother were sundered, and their business interests were entirely severed. The deceased owned in common with his brother valuable real estate, and, by his said will, he devised his interest in said real estate to one of his daughters, such devise of this interest being most of her share under the will. Thus, in separating and severing his interests from his brother, as a result of their quarrel, he divested himself of the entire real estate which by the will had been devised as the share of his daughter, and the entire scheme of the will was overthrown by this conveyance, and the result, undoubtedly, was to revoke the devise to this child. In other words, as the case stood on the 20th day of May, 1892, when the signature was canceled, the plan of the decedent to specifically devise to each of his three children real estate of the estimated value of \$300,000 or \$400,000 was annulled by the conveyances which had just

before that date been executed by him to his brother. One of his three children was in this way unintentionally disinherited, with no reference to herself, and as a purely accidental consequence of a difference between her father and her uncle; and it was the will, and not the codicil portion of the instrument, the plan of which was thus defeated.

The will also designated the brother as an executor and trustee, but obviously the testator, having become unable to amicably hold even a piece of real estate in common with his brother, was unwilling to have his brother left in power over his estate and family as an executor or trustee. Yet it was the will, and not the codicil, which would have made the brother executor and trustee.

It appears that his relations with all his children were entirely harmonious down to the day of his death, and no reason existed why any discrimination should have been made against any child. He also frequently stated during the last year of his life that he had destroyed his will, and while, under the statute, such verbal revocation will not suffice, yet I think it bears upon the question of intent, and should be given some weight under the circumstances.

It would seem, therefore, that the decedent resorted to this act of cancellation with a view to remedy what would otherwise have been a grievous and unintentional inequality between his children. Destruction of the codicil would not have had the least tendency to correct the injustice which the decedent desired to avoid. Cancellation of the entire instrument, being the will modified and reaffirmed by the codicil, furnished a complete remedy.

I am of the opinion, therefore, taking into consideration all the circumstances surrounding the act of Mr. Brookman on May 20, 1892, that he intended to revoke the entire instrument, consisting of his will and codicil, and that he died intestate, and that letters of administration should issue to the petitioner.

Ordered accordingly.

In the Matter of the Appraisal of the Estate of RODMAN
C. MOULTON, Deceased.

(Surrogate's Court, Rockland County, Filed March, 1895.)

TRANSFER TAX—PARENTAL RELATION.

The relation of parent and child does not exist between an uncle and niece, within the meaning of section 2 of the Transfer Tax Law, where he merely resided with her mother and contributed toward the household expenses in common with the other members of the family, and it does not appear that he ever called her his child or spoke of her as his daughter, or that she called him father.

Appeal from order of the surrogate fixing the tax upon the estate of the decedent under the Transfer Tax Act.

Frank Walling, for appellants.

TOMPKINS, S.—Upon the report of the appraiser heretofore made an order was made by the surrogate adjudging the estate of the deceased, devised and bequeathed to Bessie H. Winter and Cornelia M. Steeb, liable to the tax imposed by the law taxing gifts, legacies, and collateral inheritances, on the ground that they were nieces of the testator, and that the property transferred to them by the will was subject to the tax of five per cent. From that order an appeal was taken by the persons above named to the surrogate, under the provisions of section 3 of chapter 399 of the Laws of 1892.

It is claimed on behalf of the appellants that they are exempt under the provision of section 2 of the above mentioned Act, claiming that the testator "for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent," and in support of that contention referring to the testimony given before the appraiser. The testimony relied upon in support of the claim of the appellants was given by Bessie H. Winter, one of the appellants, and Charles W. Miller. It appears from their testimony that since 1865 the testator

had not resided with his wife and children, and, with the exception of an interval or two, he lived with his said nieces and their mother, who was a sister of the testator; that they lived together as one family; that the household expenses were met out of a common fund, to which each contributed. In 1888 their mother died, and, from that time to the death of the testator, Mrs. Steeb, one of the said nieces, had charge of the household affairs and domestic arrangements, and they continued thus to live together as one family down to the death of the testator. Bessie H. Winter, who was the younger of the two nieces, was employed in a New York office from the time she was fourteen years of age, and from that time to the date of the testator's death contributed a share toward the household expenses. During the period from 1884 to 1888, while the decedent was away from home, the niece, Bessie H. Winter, attended to his business for him, such as collecting rents, paying bills, etc., and she testified "that they consulted together about business matters in which each were interested." It also appears that during his sickness they cared for him; that at times he required a great deal of attention; that Mrs. Steeb would give him his medicine, and care for him during the day, and Miss Winter cared for him and watched at his bedside at night, she being absent at her business during the day. It does not appear that the decedent contributed anything towards the support or maintenance of his nieces further than he contributed his share towards the household expenses. On one occasion he advanced a sum of money to Bessie H. Winter for her use in some business venture, which she afterwards repaid to him.

During all the time they lived together the household affairs were managed by these nieces and their mother.

There is no evidence that the testator ever called them his children, or spoke of them as his daughters, nor that they ever spoke of him as father, but that they always called him "uncle," although their relations were very close, and they appeared to be very much devoted to each other.

The witness Miller, who was a neighbor, and visited frequently at their residence during the last two years of the testator's life, testified that the testator told him that Mrs. Steeb was in some way provided for by her marriage, and that he intended to take care of Miss Winter by his will, and the witness states the following conclusion: "From my experience and observation with the family of Mr. Moulton and his nieces, I should say that their relations were those ordinarily existing between father and daughters." This is substantially all the testimony given in support of the claim of the appellants.

The testator, in his will, refers to the appellants as his nieces, and makes no mention of any other relation existing. By his will he devised and bequeathed all his estate, both real and personal, to his said nieces.

I am convinced, after a careful study of the evidence and an examination of the authorities, that the property transferred by the will is not exempt from taxation, and that the order should be affirmed.

The purpose and intent of that part of section 2 of the Transfer Act which exempts property which passes to one who, for not less than ten years prior to the transfer, stood in the mutually acknowledged relation of a child, was to include among those exempted persons who may not have been legally adopted, but nevertheless stood in the same relation as children, and were acknowledged and recognized as such. The word "acknowledged" would seem to indicate that it was necessary that the deceased person had held the person to whom the transfer was made out to the world as a child, or as one to whom he bore that relation, or that he treated and considered such a one as a child; and the word "mutually" would seem to require that such a relation was mutual, and that the character of the relation was reciprocal.

However close the relations may have been, and however affectionate each may have been for the other, still the case would not come within the meaning of the statute, unless the relation

was generally understood and acknowledged to be that of parent and child. While they all lived as one household, and each assisted the other, and the greatest affection existed between them, from all the facts I am of the opinion that the relation of parent and child did not exist within the meaning and intent of the statute.

These nieces did not leave their own parents, and go to the testator, nor were they taken from their home to his home, but continued always, until their mother's death, to reside with her in the house presided over by her. The testator did not take them into his family, and support, educate and maintain them; but from the evidence it appears that when his wife deserted him he went to live with his sister, the mother of these nieces, who was keeping house, and in that manner became a member of their household, and thereafter contributed his share to the household expense, and during all the time that they lived together the household was managed by these nieces and their mother. He was their guest, an inmate of their home; and, while not dependent upon them for maintenance or attention, he received at their hands those attentions and that care which we would naturally expect from an affectionate sister and nieces.

So far as the evidence shows, he made no sacrifice for them, did not support or educate them, nor were they in any sense dependent upon him. On the contrary, one of the nieces, Bessie H. Winter, from the tender age of fourteen years to the time of the testator's death, worked in New York city, and supported herself.

The decision of the learned surrogate of Madison county, Matter of Spencer, 1 Con. 208, is cited by counsel for the appellants in support of their claim. In that case the facts are quite different than the case at bar. There, the beneficiary left her own home, and lived with and assisted her aunt for twenty-eight years, was entirely supported and cared for by the testatrix, remained at home with her during all these years, not in the capacity of a servant or companion merely, but enjoying the

same privileges and rendering the same service and bestowing the same care and attention as would a daughter, and the relations between the parties in that case were parental in their intent, character and results.

The relation which was created when the deceased sought a home with his sister, the mother of these two nieces, was continued down to the time of her death, which occurred in 1888; and if thereafter a new relation began between the nieces and the testator, it has not existed a sufficient length of time to entitle them to the exemption which they seek.

The other cases cited by the counsel for the appellants are not at all parallel to this case. In the *Matter of Butler*, 34 St. Rep. 189, the person claiming the exemption was taken from a charitable institution, at the age of two years, under an agreement with the officers of the institution to adopt him as a son, and provide him a home; and the child was immediately taken into the family of the testator, where he resided down to the time of his death, a period of eleven and a half years, during all of which time the boy was cared for, supported and maintained solely by the testator, and treated in all respects as a son. He was always spoken of by the testator and all the members of his family as a child, and he was held out to the world as a child of the testator, and supposed himself to be such, and did not know to the contrary until after the death of the testator. Six weeks after he was taken from the institution he was formally and legally adopted by the testator, with the consent of his wife, under and in pursuance of the laws of the State of Massachusetts, which were shown to be substantially the same as our own statutes on that subject. It seems that there could have been no other conclusion in that case but the one found, namely, that the mutually acknowledged relation of parent and child did exist, within the meaning of the statute. There, there was correlation and interdependence, but in the case at bar there was absolutely no dependence by the nieces upon their uncle for support, care, or protection. In *Matter of the Estate of Helen*

Capron, 30 St. Rep. 948, the testatrix was the stepmother of those who claimed exemption, and had presided over their home, cared for them from their youth, looking after their education, training, deportment and clothing, and performed all those offices which it were possible for a mother to perform, by reason of having assumed the charge and care of them by her marriage to their father.

The case nearest parallel to the case before us is *Matter of the Estate of Sweetland*, 47 St. Rep. 287.

In that case an aunt of the beneficiary resided with her sister's family without payment of board or rent, the sisters being cotenants; and petitioners, after the death of their mother, worked the farm, which all had lived upon; and it was held that this did not establish the relation of parent and child between the petitioners and the aunt, so as to exempt the petitioners of the payment of a tax on a legacy from her. In the various cases decided in which it has been held that transfers were exempt because the mutually acknowledged relation of parent and child existed, the children were taken into the family of the deceased and were made members of the family, and lived and grew up as members of the family, and were recognized and considered as such.

The fact that Bessie H. Winter repaid to the testator the money which he at one time advanced to her in a business venture is not any proof of the existence of a filial relation, but, on the contrary, the repayment of the money is some evidence that such a relation did not exist, and that it was regarded as a purely business transaction. The order should be affirmed.

Order affirmed.

Note. — Where an aunt brought up orphan nieces, but charged their estate for board and necessities, held, that the relation of parent and child did not exist between them within the meaning of that term as used in section 2 of the Transfer Tax Act. (*Matter of Birdsall*, 22 Misc. Rep. 180.)

In the Matter of the Estate of LIBRETTO TARTAGLIO, Deceased.

(Surrogate's Court, Westchester County, Filed April, 1895.)

DISTRIBUTION—FOREIGN CONSUL.

The consul-general of Italy has, under the treaty with that country, power and authority to demand and, on giving the proper receipt, to receive the distributive shares in an estate which belong to persons in his country and have been deposited in court.

Application by the Italian consul-general to compel the payment to him of the distributive shares of the widow and minor children of the decedent.

D. Humphreys and O. H. Ostrander, for petitioner; Wilson Brown, Jr., for county treasurer.

SILKMAN, S.—Application is made by the consul-general of Italy at New York to have paid to him the distributive shares of the widow and five minor children in the estate of Libretto Tartaglio, an Italian subject, who died leaving personal property which has been administered in this county, and which distributive shares have been deposited with the county treasurer pursuant to a decree of this court.

The widow and children are residents and subjects of the kingdom of Italy.

The county treasurer opposes the application upon the ground that the consul-general has no authority to receive such distributive shares, and give such an acquittance as will relieve him from responsibility.

The rights of subjects of foreign countries, both as to their persons and property, largely depend upon treaty provisions. The treaty between the United States and the kingdom of Italy provides that consuls general "may have recourse to the authorities of the respective countries within their respective districts, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen."

The term "defend," as used, is to be given the broadest meaning, and includes the power to maintain affirmatively the rights of the consul's countrymen, and our local as well as federal judiciary must, in obedience to the treaty, recognize such rights. But, in the absence of such treaty provision, a foreign consul would have much the same power.

We find the rule laid down in Kent: "The practice of our courts is that a foreign consul may assert and defend as complainant party the rights and property of a person of his nation."

The consul of a foreign nation recognized by the United States is competent to defend and watch over the interests of persons of his nation, and may bring suits for such purpose without any special authority from the parties in interest. *The Bello Corrunes*, 6 Wheat, 168.

The court says, in the case cited, "that a vice consul, duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects wherever the pursuits of commerce may draw them or the vicissitudes of human affairs may force them is the great object for which consuls are deputed by their sovereigns, and, in a country where laws govern and justice is sought for in courts only, it would be mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it."

Foreign consuls have authority and power to administer on the estates of their fellow subjects deceased within their territorial consulate. Wheat. Int. Law (2d Eng. ed.), 151; Wools. Int. Law, sec. 96.

The right to demand and sue for necessarily implies the authority to acquit and release. In case of a debt due by a

resident of this State to the widow and children of Libretto Tartaglio, there would seem to be no doubt not only of the consul's power, but his duty, under the authorities, to demand and collect it, and if so, I can see no reason in principle that would prevent his demanding and receiving moneys or property deposited in court belonging to a subject of such consul's country. Neither can I see that the infancy of some of the parties affects or limits the right or power of the consul. The question as to what disposition may be made of the property after the consul has received and exported it is something with which our courts have nothing to do; that is to be settled by the laws or authority of the government to which the foreign subject owes allegiance.

An order will be made directing the county treasurer to pay the distributive shares of the widow and children of Libretto Tartaglio in his estate, deposited with said county treasurer pursuant to the decree of this court, to the consul general of Italy at New York, upon his executing and delivering a proper receipt therefor.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Accounts of
ELLIS BROCKWAY et al., as Executors of JOHN BROCKWAY.
Deceased.

(Surrogate's Court, Rockland County, Filed April, 1895.)

LEASE—REPAIRS.

An executor who is a lessee of property belonging to the estate cannot hold the estate liable for repairs made by him thereon where the lease contained no covenant requiring the lessor to repair and his co-executor made no promise of repayment.

Judicial settlement of accounts.

Wm. McCauley, Jr., for the executors; George R. Breston, for the claimant.

TOMPKINS, S.—The only question remaining undetermined on this accounting is as to the validity of the claim of William A. Ferris, one of the executors, against the estate, amounting to the sum of \$111.50.

This claim is contested by his co-executor and some of the legatees. It is therefore necessary that the claim be established by a fair preponderance of evidence.

The claim is for services rendered by the executor, William A. Ferris, personally, in making repairs to a barn upon a farm belonging to the estate, in the town of Clarkstown. It is doubtful whether, in any event, an executor is entitled, for purely personal services, to anything in addition to the commissions allowed by statute, except the services are of an extraordinary character, but a determination of that question does not seem to be necessary in this case. Here the executor and claimant was a tenant under a lease of the premises upon which the repairs were made during his occupancy of the premises as such tenant.

The lease under which he occupied the premises contained no covenant requiring any repairs to be made by the landlord, but, on the contrary, required the lessee, under whom Mr. Ferris, the claimant, occupied the premises, "to put the fences and barn in good repair."

This was the same barn upon which the work was done for which the claim is here made. Clearly, then, it was the duty of the lessee, Miss Brockway, and of any person occupying the premises with her or under her, to put the barn in good repair. If that had been done, it is not likely that any substantial repairs would have become necessary thereafter during the term of the lease. In any event, in the absence of an agreement on the part of the estate to repair, there was no obligation resting upon its representatives to make these repairs, or cause

them to be made at the expense of the estate, and it must be assumed that they were made by Mr. Ferris as a tenant.

The obligation of a landlord to repair demised premises rests solely upon express contract, and a covenant to repair will not be implied. *Witty v. Matthews*, 52 N. Y. 512.

The claim was attempted to be made that the making of these repairs was understood and agreed to by the co-executor, and intended to be charged as an expense of the administration of the estate, but this contention is not sustained by the proof. The claimant testified that his co-executor urged him to make the repairs, but does not remember whether anything was said as to who was to pay for them. This is all the testimony in support of the claim showing any knowledge or authority of the co-executor in respect thereto. Ellis Brockway, the co-executor, testified that he had no knowledge of the work being performed by the claimant until it was done, and that he never had any conversation in reference to the estate paying therefor.

The conclusion, therefore, at which I arrive, is that the work was not done or authorized to be done by the executors or for the estate, but was performed by Mr. Ferris as a tenant of the premises in the making of ordinary repairs such as he was under obligation by law to make, and such as the estate as landlord was under no obligation to make. The claim is disallowed.

Decreed accordingly.

In the Matter of the Probate of the Will of ROBERT F.
WASHBURN, Deceased.

(Surrogate's Court, Westchester County, Filed April, 1895.)

1. CITATION—SERVICE ON NON-RESIDENTS.

A citation may be served within the State upon a non-resident in the same manner as on a resident.

2. SAME—RETURN DAY.

The return day of a citation is wholly unimportant as respects the jurisdiction of the surrogate, provided it is not less than eight days nor more than four months after its date, and may be fixed to suit the convenience of the surrogate and the petitioner.

Application for the issuance of a citation in a proceeding for the probate of the will of Robert F. Washburn, deceased.

Samuel Watson, for petitioner.

SILKMAN, S.—Application is made for the issuance of a citation to Henrietta Lyon and Joshua B. Washburn, who are non-residents of the State, returnable upon a day certain within the period necessary for the service of the same without the State.

Affidavit is made by the petitioner to the fact that service can be made within the State.

It would seem unnecessary for me to indicate my views in writing, were it not for the practice which has previously prevailed in this court; that is, not to make citations returnable in less time than it would be necessary to serve by publication, where it appears that some of the parties are non-residents, and then only accompanied by an order of publication. See *Matter of Porter*, 1 Misc. Rep. 489; 22 N. Y. Supp. 1063.

It is provided by section 2520 of the Code of Civil Procedure how citations shall be served within the State.

After declaring what the manner of service shall be, the section reads: "A citation must be so served within the county of the surrogate, or an adjoining county, at least eight days before

the return day thereof; if in any other county, at least fifteen days before the return day." Nowhere in the section do we find that such service shall be made only upon residents of the State, and it would seem that, if there is no other section qualifying the one cited, the jurisdiction of the surrogate is complete over any person or corporation sought to be brought into court by such service, irrespective of the question of residence, when the service is made within the State either eight or fifteen days prior to the return day, as the case may be. I find none.

The only other sections which seem to affect the question are sections 2522, 2524 and 2525. The former provides that "the surrogate from whose court a citation is issued may make an order directing the service thereof without the State or by publication in either of the following cases;" and then the cases are enumerated, one of which is, "where it is to be served upon a foreign corporation, or upon a person who is not a resident of the State."

Section 2524 provides that the party applying for the order must produce proof, by affidavit or otherwise, to the satisfaction of the surrogate, that the case is one specified in the previous sections, and then provides what the order shall contain.

Section 2525 fixes the time for service without the State, and for mailing pursuant to an order. The only substantial difference between the provisions for the service of a summons and those for the service of a citation by publication or without the State is that, to obtain an order for the publication of a summons, it must be shown that the summons cannot, with due diligence, be served within the State, which in the case of the citation is not required, it being sufficient to show the fact of non-residence.

The policy of the law is constantly tending towards uniformity and harmony in its forms and practice. It would be absurd to claim that a summons could not be served within the State upon a non-resident, even after an order of publication had been made and, unless there is something in the statute showing a

contrary intent, the proposition must be equally untenable as applied to a citation.

It will be seen that the surrogate is not directed to make an order of publication; the word "may" cannot be construed as used otherwise than as a permission, and then again it appears that the order must be applied for, which emphasizes the fact that the issuance of the citation and an order of publication for service without the State do not necessarily go together. The citation must be issued upon the presentation of a proper petition; the order may be granted upon an application.

It is important also to note that the law does not require the petition upon which the surrogate must act to state the residence of the persons to be cited; the place of residence may not be ascertained until after the return day has been fixed.

I see no escape from the conclusion that the return day of the citation is wholly unimportant as respects the jurisdiction of the surrogate, provided it is not less than eight days nor more than four months after its date, and the fixing of such return day is a matter to be arranged according to the convenience of the surrogate and the petitioner.

The practice of this court will hereafter be in accordance with these views.

Ordered accordingly.

In the Matter of the Application of EMILY A. O'ROURKE, as
Administratrix of MARTIN O'ROURKE, Deceased.

(Surrogate's Court, Westchester County, Filed April, 1895.)

1. EXECUTORS—LIMITATIONS—STATUTE OF FRAUDS.

An executor or administrator has no power to waive, as against the heirs at law or devisees, any legal defense under the statute of limitations or the statute of frauds.

2. WITNESS—COMPETENCY.

The testimony of officers of a religious or charitable corporation, who serve without pay or reward, is not incompetent under section 829 of the Code.

3. STATUTE OF FRAUDS—CEMETERY LOT.

An agreement for the purchase of a cemetery lot is not one for a mere license, but for an easement in land, and if not in writing is void under the statute of frauds.

4. SAME—PART PERFORMANCE.

The interment of the decedent's remains in the lot by his administrator is not a part performance which will take the agreement out of the statute of frauds as against his heirs at law.

Petition for leave to sell decedent's real estate for the payment of debts.

Robert J. Fox and John M. Perry, for petitioner; F. V. Van Kleck, Jr., special guardian.

SILKMAN, S.—The objection of the special guardian of the infant heirs-at-law to the allowance of a claim of St. John's Roman Catholic Church of \$450, alleged to be one of the debts due by decedent, to pay which this proceeding is taken, presents a question which has required much consideration. It is sought to sustain the claim solely upon the ground that it is a debt of decedent.

Martin O'Rourke died May 21, 1893, intestate, and without sufficient personal property to pay his debts.

On May 18th, prior to his death, he went to Calvary Cemetery, owned by and connected with the Church of St. John the Evangelist, with Father Tole, its treasurer, and, after looking at several plots, concluded to take one at the price of \$450, and then and there paid \$10 on account, and such treasurer thereupon opened an account in his book of accounts, charging said decedent with \$450, and crediting him with the \$10 payment. No written agreement of any kind was entered into, and no further payments were made.

The body of the decedent was buried in the plot by his widow, although he owned a plot in another cemetery at the time of his death.

Father Tole testified that when plots were paid for in full a receipt is given in the following form :

No. MOUNT CALVARY CEMETERY.

“ Office :

THE RECTORY,

“ WHITE PLAINS, N. Y.

“ Received from ——— dollars, for the privilege of burial in Mount Calvary Cemetery, in ——— graves, in plot ———, section ———, in the mode used and permitted by the trustees of St. John's Church, White Plains, N. Y., subject to the rules and regulations that have been or may be adopted from time to time by said trustees, and to the laws, usages, and discipline of the Roman Catholic Church in the Archdiocese of New York relating to sepulture, as well as the rights and ceremonies to be observed at funerals, and subject also to the consent and approval of said trustees for erecting tombstones, monuments, and other constructions thereon; it being understood that no deed or conveyance of any title or interest in the said land is to be executed, but that the whole title thereto, and the legal possession thereof, remain in the said trustees, and also that this privilege is not to be transferable or assignable, by act of law or otherwise, without the consent in writing of the said trustees.

“ Dated, White Plains, ———, 189—.

“ ———,

“ TREASURER OF MOUNT CALVARY CEMETERY.

“ \$ ———.”

But it does not appear that this fact was known to decedent.

Father Tole had no pecuniary interest in the transaction, and no personal benefit accrued to him by reason of the sale of the burial plots, either directly or indirectly.

The administratrix admits the claim, and counsel states to the court that she desires to have the same allowed.

Some question has been made as to the power of the surrogate to determine the claim. The Code, however, is clear and explicit (section 2755), but whether the power conferred is intended to give more than the right to determine what are presumptive debts only it is not necessary to determine. The decree of the surrogate is certainly binding upon the heir or devisee.

The administratrix urges that, because the claim is admitted, the surrogate's power to determine whether or not it is a *prima facie* debt is gone, and also urges that the same rule applies as is applied in cases where a debt of deceased is paid in good faith by the executor or administrator, and the burden is put upon the contestant to show that the debt did not exist. This rule cannot be extended to the present case, and only applies where there has been a payment in good faith. The fact of payment and the fact of good faith are essential to the shifting of the burden of proof from the executor or administrator to the contestant. In this case there has been no payment by the administratrix, and legal good faith would not be consistent with a knowledge that there was no written agreement in existence for the payment of the money.

An executor or administrator has no power to waive, as against the heirs-at-law or devisees, any legal defense, either under the statute of limitations or the statute of frauds; and, if they do so, it is at their peril. A payment of a claim which is either outlawed or barred by the statute of frauds, within the knowledge of the administrator, cannot be said to have been made in good faith.

The parol agreement here claimed rests upon the testimony of the witness, Father Tole, and his testimony, the special guardian urges, is incompetent under section 829 of the Code of Civil Procedure; but in this the special guardian is in error. The interest which excludes a witness under the section cited

is a pecuniary one. Such is not Father Tole's. He does not personally benefit by the sale of the burial plot, and, while he is an officer, he is only such *ex officio*, and the interest he has is entirely one of sentiment, the interest which every lot owner would have in the success of the cemetery. Nothing of value comes to him by reason of the transaction as to which he testifies, and it is therefore not the interest contemplated by the Code. The section was not intended to exclude the officers or trustees of religious or charitable institutions, serving without pay or reward.

The serious question is as to whether the claim for the balance of the purchase price of the burial plot is not within the statute of frauds, and therefore not enforceable. To determine this question it is necessary to ascertain from the surrounding circumstances what must have been in the mind of the decedent at the time of the alleged agreement, and upon what the minds of the parties met. In other words, what was the agreement, the evidence as to which is so meager. All we have is the statement of decedent that he would take the lot, and that he paid \$10 on account of the purchase. Did the decedent have in mind that he was to have a grant giving him a fee or an easement subject to the proprietary rights of the corporation, or a lease for a term, or a receipt entitling him to a mere license to bury? If the agreement was for a grant or a lease, it would be clearly within the statute of frauds, and no claim can be predicated upon it. On the contrary, if it was an agreement for a mere license, it may be by parol, and therefore not within the statute.

It is claimed that under the rules and regulations of the church there was no authority to give the purchaser of a plot other than the receipt above quoted, which would confer merely a license to bury; and it is also claimed that the purchasers were presumed to know the rules and regulations and to have bought subject to them. There is no doubt as to the latter proposition, with certain limitations.

The rules and regulations which a purchaser is presumed to know are such as are contemplated by the law.

By chapter 501 of the Laws of 1881 it is provided that: "Any incorporated religious society within the State of New York who now has or may hereafter hold or acquire lands for the purpose of a burial place or cemetery may sell lots or plats in such burial place or cemetery upon such terms as may be agreed, subject to such conditions and restrictions as may be imposed upon the use of such lots or plats by the rules and regulations now adopted by such religious corporation. The conveyance shall be executed under the common seal of the corporation, and shall be signed by a majority of the trustees of the corporation making such sale."

It will be seen that the rules and regulations provided for apply only to the use of the plats, and not to the title or interest in the land which the purchaser takes. The act also provides for a deed to be given the purchaser, and directs the manner of execution, and by whom it shall be executed. If Martin O'Rourke is to be presumed to have known anything, it must be the statute quoted, which provides for a grant, and a grant only. There is not a word or suggestion about a burial license.

The act also provides that remains shall not be removed where compensation is paid, except upon a vote of three-fourths of the congregation, and the expense of removal to be paid by the church, which provision is wholly inconsistent with the idea of a license, which is personal and revocable.

But without the aid of the statute it may be said that the very nature of the right of sepulture implies a right in land lasting in its character. The final resting place of the dead should be undisturbed and inviolate. For no interest in land, other than an absolute fee, can there be claimed a greater right of permanency. It is sacred in its nature. No one would be presumed to have selected as a place of burial one in which his or her remains could lie only during the pleasure and subject to the whim of a corporation, religious or otherwise. The right of sepulture in its very nature implies an easement. It is an incorporeal hereditament. It is true that burials in cemetery plots

may be prohibited, and bodies disinterred and reinterred elsewhere, even though there be a grant of the fee to the burial plot; but this can be done only by legislative authority, and where for sanitary or other sufficient reasons it becomes necessary; the health of the living being of more consequence than the repose of the dead.

The characteristics of a license are repugnant to the idea of a burial place. A license is personal and revocable. Wash. Real Prop., chap. 12, sec. 2.

In this it differs from an easement, which can only be founded upon a grant or by prescription.

If the alleged agreement was for a license, the right of burial ceased with the death of Martin O'Rourke; and if he had continued to live it could have been terminated at any time at the election of the corporation.

If the agreement was for the permanent occupation of the burial plot, by whatever name such occupation might be called, the very object sought to be attained by the statute of frauds would be defeated.

SAVAGE, C. J., in *Mumford v. Whitney*, 15 Wend. 380, says: "To decide that a right to a permanent occupation of the plaintiff's land may be acquired by parol, and by calling the agreement a license, would be in effect a repeal of the statute of frauds."

The reason why a license may be created by parol is because it is personal, and revocable.

The cases of *People ex rel. Coppers v. Trustees*, 21 Hun, 184, and *McGuire v. St. Patrick's Cathedral*, 54 id. 207, do not affect the question here, as in those cases the agreement was executed, and not executory.

Neither was it necessary to the disposition of those cases that the interest of the plot holder should be held to be only that of a license.

In the *Copper's* case, however, the court distinctly held that under the receipt there given no action could be maintained,

as the agreement was void under the statute of frauds. See, also, case of Conger v. Treadway, 50 Hun, 451.

The conclusion is irresistible that the agreement was not for a license, but for an interest in land.

The claim that, because the remains of Martin O'Rourke were interred in the plot in question by the administratrix, there has been a part performance, is not tenable. Part performance must be with the knowledge and consent of the contracting party, his heirs or assigns.

The act of the administrator cannot bind the heirs.

The claim of the Church of St. John the Evangelist is disallowed.

Ordered accordingly.

In the Matter of the Estate of CHARLES WINSLOW, Deceased.

(Surrogate's Court, Oneida County, Filed April, 1895.)

SURROGATES—COMPLETION OF PROCEEDINGS BY.

Where the office of a surrogate becomes vacant by his death or expiration of his term after he has filed an opinion, but before he has rendered a decision in a proceeding for an accounting, the proper course for his successor to pursue is to continue the proceeding from the point where it was left, and upon the evidence previously taken, and any additional proofs that may be offered, to make the proper decision.

Application that proceedings for a judicial settlement be completed before the present surrogate.

P. F. Bulger (D. C. Stoddard, of counsel), for Mary L. O'Connor, for application; E. D. Mathews, for Michael A. McOwen, opposed; Leslie W. Kernan, for executors; Henry L. Gates, special guardian.

CALDER, S.—The petition for the judicial settlement of the accounts of Michael A. McOwen and Thomas Manahan, as executors of the last will and testament of Charles Winslow, was presented on the 28th day of December, 1892, and thereupon a citation was duly issued, directing that all parties interested be and appear at a Surrogate's Court, in the city of Utica, on the 16th day of January, 1893.

The executor's account was filed December 28, 1892. Objections to the same having been filed, testimony in respect thereto was taken from time to time before Surrogate BRIGHT.

During the evening of the 4th of June, 1894, the day upon which the case was submitted, he died, leaving the questions in dispute undecided. It was thereafter stipulated that upon the evidence a reargument should take place before his successor. Same was had on the 28th day of September, 1894, and on December 18th the surrogate filed his opinion. His term of office expired on December 21, 1894.

An affidavit was subsequently presented to the present surrogate, containing a statement of the proceedings herein, upon which an order to show cause was granted, returnable February 25, 1895, why the same should not be completed. All parties were heard upon the motion. This follows the practice suggested in *Matter of Espie*, 2 Redf. 445.

The opinion of the former surrogate was expressive of his views upon the questions in controversy, and directed that findings in harmony with his conclusions be proposed for settlement. No findings of fact or conclusions of law were made, and nothing was done upon which a proper decree could be entered. That the surrogate did not consider that he had filed anything more than an opinion was clearly indicated by his concluding directions.

An opinion contains the views of the judge in relation to a given subject. A decision embraces the findings of the court, upon which a decree or judgment may be entered.

Section 2545 of the Code of Civil Procedure provides that

the surrogate must file in his office his decision in writing, which must state separately the facts found and the conclusions of law. The repeal of section 1033 is immaterial, as that did not apply to the practice in Surrogate's Court. *Hartwell v. McMaster*, 4 Redf. 392.

What a decision should contain is well settled, and the questions in relation thereto have been frequently passed upon. *Angevine v. Jackson*, 103 N. Y. 740; *In re Falls' Estate*, 10 N. Y. Supp. 41; *In re Peck*, 39 St. Rep. 234; *In re Kaufman*, id. 236; *Hartwell v. McMaster*, *supra*.

A case on appeal will be remanded when it appears that no decision has been filed containing findings of fact and conclusions of law. *In re Falls' Estate*, *supra*.

No decision in this proceeding was, therefore, filed, as provided by the Code of Civil Procedure.

In what manner and from what point can the present surrogate proceed?

Three ways are suggested:

First. To file findings of fact and conclusions of law in harmony with the opinion of the former surrogate.

Second. To take up the matter *de novo*.

Third. To take up the proceedings at the close of the evidence, hear additional testimony that any party interested may offer, and upon the whole evidence file a decision which will contain findings of fact and conclusions of law.

I do not believe that the first or second method is the proper practice to follow. To sign findings based upon the opinion of the former surrogate would not make them his, for he did not formulate them; and, to be his, he should sign them. Neither would they be the findings of the present surrogate, predicated upon what he believed to be the correct interpretation of the evidence, for he did not hear the testimony, nor has he read the evidence.

To sign findings in this matter would be simply a mechanical act, not conclusive upon any party in the controversy.

In Matter of Will of McCue, 17 Wkly. Dig. 501, the evidence was taken before the surrogate, who filed an opinion upon the last day of his term of office, expressing his views, but not containing findings of fact or conclusions of law. His successor, proceeding upon his opinion as filed, admitted the will to probate. It does not appear that the surrogate reviewed the evidence, or that anything was done upon notice to the contestants, or that a statement was presented to the court containing a history of the proceeding.

It was held that great doubt existed as to the power of the successor to make formal findings upon the opinion of his predecessor.

Here all the parties are in court, and have been cognizant of every step in the proceeding.

The evidence was transcribed at a large expense to the estate, the preparation of counsel involved a great amount of labor, and the court was engaged a considerable length of time, and to urge that the matter be taken up *de novo* seems unnecessary, if not improper.

The personnel of the court may change, but the court itself is the same; the office continues.

I appreciate the suggestion of counsel that the witnesses and the testimony offered can, perhaps, be better understood if the court deciding the questions may have the benefit of the presence of the parties testifying. It would be a hardship, however, to compel proceedings of this character to be taken up *de novo*. If such were the case, upon the entry of each surrogate upon the duties of his office, it would seriously interrupt the work of the court, incur a large expense, and, in many instances, do injustice. I do not believe the legislature intended to impose such a burden upon the court or litigants.

The Code provides (sections 2513, 2500) that the surrogate, in his discretion, may appoint and at pleasure remove a stenographer, and that every deposition, petition, report, account, voucher or other paper must be carefully preserved, and that he

shall deliver to his successor all papers and books kept by him; that said stenographer (section 2541) must, under the direction of the court, take full stenographic notes of all proceedings in which oral proofs are given, and the testimony must be legibly written out at length from the notes; that the minutes, after being properly authenticated, must be filed.

The above sections, taken together, make the minutes records in the surrogate's office, and it is, therefore, unnecessary to take testimony again. Where testimony on the probate of a will has been commenced before the surrogate, and his term of office expires before it is completed, his successor in office need not take the testimony *de novo*. *Reeve v. Crosby*, 3 Redf. 74. The same principle is laid down in *Matter of Martinhoff*, 4 Redf. 286, and in *Matter of Espie*, 2 id. 446.

The third proposition I believe to be the correct one to follow.

Section 2481, subd. 8, provides that a surrogate has power to complete any unfinished business pending before his predecessor in office, including proofs, accountings and examinations. This is unfinished business, and is an accounting, and the statute is broad enough to confer jurisdiction upon me to complete this proceeding. The general rule drawn from the cases last cited is that upon the office of the surrogate becoming vacant, either by death of the incumbent or upon the expiration of his term of office, his successor has power to take up the matter where left by his predecessor, continue the proceeding, and in a proper manner carry the same to its final determination. It is due, however, to any party interested that he have the right to offer additional or explanatory evidence upon any part of the issues involved. In this manner every interest will be fully protected.

Upon reading the evidence taken by the former surrogate, and after hearing any additional proofs that may be offered, the present surrogate can then make his decision in writing,

containing findings as required by the Code, upon which a decree may be entered.

An order may, therefore, be entered re-opening the case, and giving any party interested the right, upon proper notice, to produce additional proofs, after which, at a time to be agreed upon, the case may be submitted.

Ordered accordingly.

In the Matter of the Estate of NATHANIEL MANLEY, Deceased.

(Surrogate's Court, Cattraugus County, Filed May, 1895.)

1. ADMINISTRATION—ORDER OF PRIORITY.

The order of priority in cases of administration with the will annexed, as fixed by section 2643 of the Code, is not affected by the provisions of section 2693.

2. SAME—DISQUALIFICATION.

No degree of moral guilt or delinquency will disqualify a person from acting as administrator, unless he has actually been convicted of crime.

3. SAME.

Drunkenness, improvidence or want of understanding, to disqualify, must amount to habitual drunkenness or a lack of intelligence.

Proceedings on appointment of administrator with the will annexed.

George Straight, for petitioner; V. C. Reynolds, for contestant.

DAVE, S.—Nathaniel Manley died at the town of New Albion February 1, 1895, leaving a will dated July 10, 1882, which was admitted to probate April 10, 1895. The executor named in the will having renounced, W. J. Manley, a son of

testator, made application for letters of administration with the will annexed.

The testator left four children, viz.: the petitioner, Emmett F. Manley and Jennie Woodward, all residents of Cattaraugus county, and Martin H. Manley, residing in Nebraska, all of whom are residuary legatees; none of the other children seek to be appointed, but objections are filed on behalf of the son, Emmett F., alleging that the petitioner, in consequence of drunkenness, dishonesty and improvidence, is not qualified to act.

The statute determines the order of priority in cases of administration with the will annexed; those first entitled are "one or more of the residuary legatees who are qualified to act as administrators." Code Civil Proc., sec. 2643, subd. 1.

This order of priority is not affected by section 2693 of the Code of Civil Procedure, which provides that where all the executors are incapable letters shall be issued as in case of intestacy. Matter of Place, 4 St. Rep. 533; 105 N. Y. 629.

The petitioner, being a residuary legatee, and the only one applying, is legally entitled to appointment if qualified to act, and his rights cannot be defeated unless it is made to appear that he is disqualified to the extent contemplated by the statute, for letters of administration *cum testamento annexo* can only be denied to one otherwise entitled for cause constituting a statutory disqualification. Matter of Place, 4 St. Rep. 533.

The nature of such disqualification is defined in section 2661, Code of Civil Procedure, as amended by the Laws of 1893, as follows: "Letters of administration shall not be granted to a person convicted of an infamous crime . . . nor to any one who is adjudged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding."

The courts, in construing this statute, have determined that not every degree and grade of the vices and defects mentioned disqualify. In *Emerson v. Bowers*, 14 N. Y. 449, the Court

of Appeals says: "All departures in conduct from the principles of rectitude, including all abuses of trust, are unwise and inexpedient, and therefore, in a certain sense, improvident, but they do not constitute the kind of improvidence which the legislature had in view in these enactments; a very careful, shrewd and money-making person may be guilty of negligence or abuse in a fiduciary capacity, but such a person is not improvident in the sense of the statute. The words with which the term is associated, 'drunkenness, want of understanding,' are of some importance in arriving at its true construction; the term evidently refers to habits of mind and conduct which become a part of the man, and render him generally and under all ordinary circumstances unfit for the trust or employment in question." See opinion, page 454, *Emerson v. Bowers*, *supra*.

In the case of *Coope v. Lowerre*, 1 Barb. Ch. 45, it appeared that the applicant had shortly before applied for a discharge under the insolvent act; that he was grossly negligent in the management of his property and affairs, and in contracting debts, and in indorsing for parties without responsibility; that he had had a verdict against him in an action for seduction; and other serious imputations were made against his moral character. But the chancellor, upon appeal from the decision of the surrogate appointing the applicant, held that no degree of moral guilt or delinquency would be sufficient to exclude him, unless he had been actually convicted of crime. This case is cited and approved in *Emerson v. Bowers*. It has been held that vicious conduct, improper and dishonest acquisitions of property, and even loose habits of business, did not constitute "improvidence" within the meaning of the statute; nor the fact that the petitioner was indebted to the estate. *Coggshall v. Green*, 9 Hun, 471. Improvidence and lack of undersanding, in order to disqualify, must amount to a lack of intelligence. *Shilton's Estate*, 1 Tuck. 73. Habits of intemperance do not disqualify, unless they amount to habitual drunkenness in the legal sense of the term. *Elmer v. Kechele*, 1 Redf. 472.

In the case at bar, the evidence shows that the applicant is addicted to some extent to the use of intoxicating liquors; that upon two occasions during the past ten or twelve years his conduct indicated intoxication. It was also alleged that the applicant had upon one occasion been guilty of political dishonesty in having received money to aid in defeating the election of a candidate of the party to which he belonged, but this charge was not sustained by the evidence. On the contrary, a number of substantial business men from the locality where the applicant had resided and been engaged in business for many years testified quite distinctly to his integrity and business capacity. The witness McCabbin testified that during the past few years he had transacted business with the applicant to the extent of \$300,000; and, as he says, quoting from his evidence, "I have always found him a strictly honest man, and a man of intelligence; I have never discovered anything in his dealings with me but what was strictly honest." Witness Carroll testified that he had been well acquainted with the applicant for many years, at one time a partner with him in business, and had had extensive business relations with him since 1885. He says: "During that time I have never seen anything dishonest on his part; always found him square and honorable. He has been president of the village of Cattaraugus, a member of the school board and supervisor of the town of New Albion within the past few years." The testimony of several other witnesses, having ample opportunities to judge of the applicant's habits and business practices, is of the same import.

In view of this evidence and of decisions cited, a determination that the applicant is disqualified under the statute would be entirely unsustained by authority. A decree will accordingly be entered appointing the applicant administrator with the will annexed, and directing the issuing of letters to him upon his filing the proper bond.

Ordered accordingly.

In the Matter of the Estate of MARIETTA GROVER, Deceased.

(Surrogate's Court, Herkimer County, Filed June, 1895.)

WILL—LIFE ESTATE.

In the absence of any other provision showing testator's intent, a devise of land to one "and at her decease to become the property of her son," will be held to give a life estate to the former and to vest the fee in the son.

Proceedings for the appraisement of the estate under the Transfer Tax Act.

Henderson & Bell, for George Chassell; I. R. Devendorf, for the county treasurer.

SHELDON, S.—By her last will and testament Marietta Grover made the following devise: "I give, devise and bequeath to my sister, Eliza Chassell, of Holland Patent, in the county of Oneida and State of New York, my house and lot located on Steuben street, in Holland Patent, county and State aforesaid, and at her decease to become the property of her son, George Chassell."

The question for determination is whether Eliza A. Chassell takes the house and lot absolutely and in fee, or does she take a life estate only and the remainder in fee vest in her son George? The controlling rule in the construction of wills is that the intention of the testator must govern, unless carrying the intention into effect would violate the law. In arriving at the intention of the will-maker words must be given their ordinary meaning, unless their use in a different sense is manifest from other language and provisions, and, if possible, all the words used by the testator are to be considered in arriving at the intent.

I find no other provision of the will or language used therein which sheds any light upon the intent of the testator in making

this devise. The devise must be clearly of a fee if it were not for the words "and at her decease to become the property of her son, George Chassell."

The district attorney, for the people, contends that the effect of the whole is to give Eliza a life estate and the remainder in fee to her son George. George contends that his mother was intended to have an absolute estate, and that only in case of the death of his mother before the death of the testator was he to have the property, and as that contingency has not happened his mother takes the fee. His contention is that the clause must be construed as though the concluding portion read, "and in case of her death the property shall go to her son, George Chassell." It is well settled that the use of such language imports the intention to provide for the happening of a death prior to the death of the testator, and in this case, if such is the meaning, George Chassell takes nothing, as the contingency has not occurred, the mother, Eliza, having outlived the testator. But I am of the opinion that the testatrix did not have in her mind and intend to provide for the happening of the death of her sister Eliza before her own death, but that she had in her mind that her sister Eliza should have and enjoy the property devised to her during her life, and that at her death George should own and enjoy it. Such is the natural meaning of the language used. The property could not become the property of George at the death of Eliza unless Eliza outlived the testatrix. The idea was plainly that there should be a succession of estates, the mother should have the property, and at her death it should become the property of George. Such succession provided for by the will necessarily made the first estate a life estate only, and the fee vested in George Chassell.

It follows that the estate of George Chassell in the house and lot devised is subject to appraisal, and if the total amount passing to George Chassell under the will is sufficient to be liable to the tax such tax must be assessed.

Ordered accordingly.

In the Matter of the Application for Letters of Guardianship of
the Persons and Estates of JEROME ALEXANDRE *et al.*

(*Surrogate's Court, New York County, Filed June, 1895.*)

GUARDIAN—TESTAMENTARY.

Since the passage of chapter 175, Laws of 1893, a father cannot by will appoint the surviving mother as guardian of his infant children.

Application for letters of guardianship of the persons and estates of Jerome Alexandre and Leonie Alexandre.

Frank L. Hall, for petitioner.

ARNOLD, S.—The petitioner is the mother of the infants in this proceeding, wherein she applies for letters of guardianship of their persons and estates. The father of the infants having deceased, the petitioner would be entitled to letters, pursuant to the provisions of Code, section 2827, upon proper application therefor, the minors being under the age of fourteen years. In such case, security must be required of her. *Id.*, sec. 2830.

But she makes application for letters without bond, under section 2852, as a guardian appointed by will. Her petition therefor is based upon the provisions of the will of her deceased husband, the father of the minors, which was admitted to probate in this county on October 31, 1894; such petition having been duly presented within three months thereafter. The testator, by his will, in terms, appointed his wife, the petitioner, guardian of such of his children as should be minors at the time of his death, which occurred August 8, 1894.

By chapter 175, Laws of 1893, the legislature of this State enacted an amendment to section 1, title 3, chapter 8, of the second part of the Revised Statutes. The effect of such an amendment was considered by the General Term of the Supreme Court, in this district, in Matter of Schmidt, reported in 77

Hun, 201; and it was there held that it repealed all authority conferred by former statutes upon the father to appoint a testamentary guardian during the lifetime of the mother, and that no such authority existed independent of statute. In that case the father, by will, undertook to appoint guardians of his minor children. His wife was not one of the appointees, but she gave her written assent that letters should be granted to the nominees of the will, as testamentary guardians. The court held that such assent did not remove the difficulty.

It is argued here that the legislature never could have contemplated a case like the present one, or intended to forbid the appointment by a parent, in his will, of the surviving parent as guardian of their minor children. But if the power to make such appointment did not exist at common law, and it is not conferred by any statute, no force can be given to it, if its exercise is attempted. I cannot see that the fact that the attempted appointment is of the surviving parent alters the case. She can apply for letters of guardianship, and can obtain them, upon giving the security required by law. This may involve some hardship, but that cannot be avoided. As the General Term suggests in its opinion in the case cited, it is not well to take any risks in such matters.

The application must be denied.

In the Matter of Proving the Will of HARRIET L. LOSEE,
Deceased.

(Surrogate's Court, Westchester County, Filed June, 1895.)

WILL—WITNESS.

A person who is unable to see is incompetent to act as an attesting witness.

Probate of will.

William A. Jaycox, for petitioner; George C. Andrews, special guardian, contestant.

SILKMAN, S.—The objections of the special guardian raised the question whether the paper propounded as the last will and testament of Harriet L. Losee was signed by two attesting witnesses.

The paper bears date the 6th day of December, and purports to be signed by the decedent, and attested by Eliza Brown and Elizabeth T. Lefurgy, as witnesses. There is no attestation clause.

The testimony of the witness Lefurgy is to the effect that, at or about the date of the paper, it was signed by the decedent, in the presence of Mrs. Brown and witness, declared by the decedent to be her last will, and that thereupon decedent requested Mrs. Brown and witness to sign as witnesses; Mrs. Brown's eyesight being such that she could not see to write, witness signed Mrs. Brown's name as well as her own, signing Mrs. Brown's at her request. No one else was in the room at the time. Decedent was in bed, and Mrs. Brown and witness stood by the bedside while the paper was signed upon a book, Mrs. Brown supporting decedent while she wrote.

Mrs. Brown gives similar testimony, except that she testifies that her eyesight was so poor that she could not see whether there was ink on the pen with which decedent wrote, and that

her eyesight has been about the same for fifteen years. Upon the witness stand she was unable to distinguish the writing upon the paper propounded, and in endeavoring to point out the signature, held the paper upside down without being aware of it, and actually pointed to the body of the instrument as the place where the names of the decedent and alleged witnesses were. Her efforts were such as to make it clear that she could only discern that the paper in her hand was not merely a piece of blank paper. She wholly failed to identify it as the one upon which she requested Mrs. Lefurgy to write her name.

The Revised Statutes, among other requisites for the proper execution of a will, provided: "There shall be at least two attesting witnesses, each of whom shall sign his name at the end of the will at the request of the testator."

One of the main objects of the statute is for the purpose of having the paper intended to be the last will and testament signed by two persons as witnesses who can subsequently identify it as the one which they saw the testator sign, or upon which they saw testator's signature. A witness is one who has knowledge of a fact or occurrence sufficient to testify in respect to it. In the case of a will, a witness must have knowledge that the paper is a will by the declaration of the testator that it has been signed, by either seeing the signature written or by seeing the signature with an accompanying acknowledgment by the testator that it is his or her signature. *Lewis v. Lewis*, 11 N. Y. 220; *Mitchell v. Mitchell*, 16 Hun, 97; *Matter of Mackay*, 110 N. Y. 611; *Sisters of Charity v. Kelly*, 67 id. 409; *Wills v. Mott*, 36 id. 486; *Matter of Van Geison*, 47 Hun, 8; *Matter of Bernsee*, 141 N. Y. 289.

In the Mackay case, EARL, J., in writing the opinion, says: "Subscribing witnesses to a will are required by law for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless, at the time of the attestation, they see it."

And, in the case of Bernsee, ANDREWS, C. J., cites the Mac-

key case, and says: "It is essential to the due publication of a will, either that the witnesses should see the testator sign the will, or that such signature should have been affixed at some prior time and be open to their inspection."

The loss of the sense of sight does not disqualify a person as a witness in many transactions, where they obtain knowledge of the transaction through the other senses than that of sight. By the sense of hearing, a witness can testify to the sound of the voice; by the sense of feeling, to the question of shape; through the sense of smell, to the matter of odors. But without the sense of sight a person is incompetent and cannot be attesting witness to a will. There must be an identification of the instrument by one who has seen the signature written, or has seen the signature which has been acknowledged by the testator as his or hers.

The paper propounded is identified only by the witness Lefurgy. She is the only one who saw the signature of the decedent at the time of the execution, and can swear that it is the paper which the decedent signed, and which she signed as a witness. It is true that the statute permits the proof of the handwriting of the decedent and of the subscribing witness or witnesses, where the subscribing witness or witnesses are dead, or absent from the State, and their testimony cannot be obtained; but the statute applies only where there have been two attesting witnesses who have signed their names as such. The statute was passed to allow the probate of wills that had been executed with all the formalities required by law. The difficulty in this case is that there was but one witness, and the formalities prescribed by the statute were not fulfilled. Mrs. Brown was not a witness, because she could not see at the time of the alleged execution. If she had been able to see then, and subsequently lost her sight, the case might be different. Such was the case of *Cheaney v. Arnold*, 18 Barb. 434, relied upon by the proponent. In that case, a subscribing witness who had signed the will had become blind by reason of great age. The

case was decided upon the well-established legal principle that where the witnesses are dead, or by lapse of time do not remember the circumstances attending the execution, the law, after diligent production of all the evidence existing, if there are no circumstances of suspicion, will presume a proper execution of the will, particularly when the attestation clause is full.

The statute prescribing the necessary formalities for the due execution of a will was passed to provide against fraud and imposition, and the protection given by it cannot be repealed by the court. Its wisdom needs no argument to sustain it, even though in isolated cases injustice is done and the wishes of the dead are thwarted.

A decree will be entered, denying probate.

Decreed accordingly.

In the Matter of the Estate of NELSON B. GREGORY, Deceased.

(*Surrogate's Court, Otsego County, Filed June, 1895.*)

1. **ADOPTION.**

The adoption papers in the case of an illegitimate child need not show the fact of its illegitimacy; it is sufficient that such fact was shown on the examination.

2. **WILL—PROBATE.**

Where the petitioner for probate of a will has knowledge that proceedings for adoption of a child were taken by the testator, he has no right to pass upon the validity of such proceedings, but should allege the facts in his petition.

3. **SAME—CITATION.**

To confer jurisdiction on the surrogate in probate proceedings, citations must be issued and served; waivers of service cannot be accepted in lieu thereof.

Proceedings on behalf of Jeanne Marie Nellie Genin Gregory to open, vacate and set aside a decree, heretofore entered, admitting to probate the will of Nelson B. Gregory, deceased.

Charles T. Brewer, as special guardian and attorney (E. R. Olcott, of counsel), for petitioner; D. P. Loomis (E. D. Wagner, of counsel), for respondents.

ARNOLD, S.—This is a proceeding to open, vacate and set aside a decree of the Otsego county Surrogate's Court, entered October 16, 1894, admitting to probate as the last will and testament of Nelson B. Gregory, deceased, a paper writing, dated June 27, 1889, on the ground that the only heir-at-law and next-of-kin of said Nelson B. Gregory, deceased, was not cited in the proceedings for probate.

Nelson B. Gregory was never married. For a number of years he lived in France. While a resident of France he lived and cohabited with a woman by whom he had six children, among them the petitioner in this proceeding. About 1878, he returned to the United States, and became a resident of the town of Unadilla, county of Otsego, N. Y., of which place he remained a resident down to the time of his death.

The petitioner herein claims to be the legally adopted daughter of said Nelson B. Gregory, and, as such adopted daughter, that she is his only heir-at-law and next-of-kin.

Respondents claim that she was never legally adopted. They base this claim on the fact that it does not appear in the adoption papers that said Jeanne Marie Genin Gregory was the illegitimate child of said Nelson B. Gregory.

I do not think the point is well taken. Nelson B. Gregory was the natural father of the child he was seeking to adopt. He was never married. Jeanne Marie Genin was the mother of this child. She resided in Lyons, France. The mother was never married. The child was illegitimate, and upwards of the age of twelve years. She had no general guardian, and was living with said Nelson B. Gregory at the time of the adoption. All that was necessary for adoption, under these circumstances, was (1) the consent of the child; (2) the consent of the mother, signed, duly acknowledged and certified in the manner required for conveyance of real estate to entitle it to record; (3) the

appearance of Nelson B. Gregory and the child before the county judge of Otsego county for the execution of the agreement to adopt, and for the examination of the said Nelson B. Gregory and the child separately; (4) if satisfied that the moral and temporal interests of the child would be promoted by adoption, the making of the order by the county judge, directing that said child should thenceforth be treated and regarded in all respects as the child of said Nelson B. Gregory.

All of this was duly done, and on his examination said Nelson B. Gregory stated that this child was his natural daughter. It was not necessary that it should appear upon the face of the adoption papers that she was an illegitimate child. I take it that all of these requirements of the statute were intended for the protection of the child, and of the persons sustaining to the child the legal relations of parent, guardian or protector.

In this proceeding it is the duty of the court to place the petitioner in the same position, and give her the same rights, as those to which she was entitled before the petition for the probate of this alleged last will and testament was presented to the court.

At the time the petition for probate was presented, the petitioner had full knowledge of the adoption proceedings, and it was his duty and the duty of the attorney who prepared the petition, and who also had knowledge of the facts, to have set forth in the petition that this child was alleged to be the adopted daughter of the decedent. They had no right to pass upon these adoption papers judicially, and hold, for the purpose of subverting their own ends, that she was not a legally adopted child, and was, therefore, not entitled to be cited in the proceedings for the alleged will. That was a matter for the court to determine in a proper proceeding.

The statute relating to the adoption of children provides that the child, when adopted, shall take the name of the person adopting, and the two thenceforth shall sustain towards each other the relation of parent and child, and have all the rights,

and be subject to all the duties, of that relation. Laws of 1887, chap. 703, sec. 10.

The Code of Civil Procedure provides that upon the presentation for the probate of a will the surrogate must issue a citation, if the will relates to both real and personal property, to the husband or wife, if any, and to the heirs and all the next-of-kin of the testator.

At the time this petition was presented to the surrogate this child was, apparently, the only heir-at-law and next-of-kin of the testator, and the only person required under the Code to be cited in that proceeding.

While she may not have any rights in the property of the testator, she is entitled to her day in court for the purpose of cross-examining the subscribing witnesses to the will, and for the purpose of having her rights judicially determined.

It is further claimed by the respondents that, if this decree it to be opened, it should be opened only as to the petitioner, and should stand so far as it relates to the other parties, and that the letters issued on said will should remain in full force and effect, pending further proceedings.

The petition for the probate of the will named the brothers and sisters and some nephews and nieces as the only heirs-at-law and next-of-kin of the decedent. A citation was issued thereupon to these persons, but this citation was never served. Before the return day thereof the petitioner appeared in Surrogate's Court with written waivers from all persons named in the citation, whereby they waived the issuance and service of a citation, and whereby they attempted personally to appear in the Surrogate's Court, and consented that said will be admitted to probate, and letters issued thereon without further notice to them. Four of the persons executing these waivers were non-residents. If the view taken above is correct, none of them were necessary parties in proceedings to probate the will, and the decree should be wholly set aside. But, supposing them to be

necessary parties, should the decree as to them be allowed to stand?

Section 2516 of the Code of Civil Procedure provides: "Except in a case where it is otherwise specially prescribed by law, a special proceeding in a Surrogate's Court must be commenced by the service of a citation, issued upon the presentation of a petition."

Section 2614 provides that: "A person designated in a will as executor, devisee or legatee, or any other person interested in the estate, or a creditor of the decedent, may present to the Surrogate's Court having jurisdiction a written petition duly verified, describing the will, setting forth the facts upon which the jurisdiction of the court to grant probate depends, and praying that the will may be proved, and that the persons specified in the next section may be cited to attend the probate thereof. Upon the presentation of such a petition the surrogate must issue a citation accordingly."

Section 2615 provides that: "The following persons must be cited upon a petition presented as prescribed in the last section: (1) If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator; (2) if the will relates exclusively to personal property, the husband or wife, if any, and all the next-of-kin of the testator; (3) if the will relates to both real and personal property, the husband or wife, and all the heirs and next-of-kin of the testator."

Section 2517 provides that: "The presentation of a petition is deemed the commencement of a special proceeding within the meaning of any provision of this act which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section a citation issued upon the presentation of the petition must, within sixty days thereafter, be served as prescribed in section two thousand five hundred and twenty of this act."

Section 2520 provides how a citation must be served within the State, and it also provides that, in case the person to be served is an adult, and is not incompetent, he may assent in writing to the service within a shorter time than that fixed by the section.

Sections 2522, 2524 and 2525 provide for service without the State.

Section 2528 provides that the appearance of a party against whom a citation has been issued has the same effect as the appearance of a party in an action brought in the Supreme Court.

Section 2532 provides how proof of a citation may be made. It must be made in the manner prescribed by law for proof of service of a summons issued out of the Supreme Court, or proof of service must be made by affidavit, or, where the person served is of full age, and not incompetent, by a written admission signed by him, accompanied with proof by affidavit or otherwise of the genuineness of his signature.

These are the steps necessary to be taken in order for the surrogate to acquire jurisdiction of the persons of the necessary parties to the proceeding.

In proceedings for probate it is nowhere "otherwise especially prescribed by law" that the surrogate may obtain jurisdiction in any other way. There are certain proceedings in the Surrogate's Court in which other methods are especially prescribed by law. For instance, in proceedings for administration.

And although, prior to January 1, 1895, it had always been the practice in this county to accept the waivers in lieu of the issuance and service of a citation, I think the practice was wholly unwarranted.

In proceedings affecting the title to real estate I think the practice was dangerous. While a party has the undoubted right to waive any of his rights, there is a broad distinction, it seems to me, between his power to waive his rights and his power to waive the express provisions of a statute as to how a court shall

obtain jurisdiction of a proceeding and of the persons of necessary parties thereto.

It follows from these views that the decree heretofore entered on the 16th of October, 1894, admitting to probate the paper writing purporting to be the last will and testament of Nelson B. Gregory, should be opened, vacated and set aside.

Decreed accordingly.

**In the Matter of the Judicial Settlement of the Accounts of the
Estate of JOHN C. MAACK, Deceased.**

(Surrogate's Court, Cattaraugus County, Filed June, 1895.)

1. WILL—LIFE ESTATE.

Where a life estate is given to the widow, a subsequent clause requiring her to maintain the estate in as good condition as possible does not charge testator's debts upon her income.

2. SAME—RIGHTS OF WIDOW.

Where the property consists of a dairy farm, the life tenant is not chargeable with the produce on hand at testator's death, which was actually used and consumed on the farm.

3. EXECUTORS—ACCOUNTING—INVENTORY.

Where the appraisers fail to set apart the statutory allowance to the widow, an amendment of the inventory is not requisite; but the error may be corrected on the final settlement.

Proceedings for the judicial settlement of the accounts of an administrator with the will annexed.

John Mosher, for administrator; Hudson Ansley, for administrator of Mary Maack estate.

DAVIE, S.—John C. Maack died at the town of Little Valley on the 25th of July, 1888, leaving a will dated December 17,

1885, which was admitted to probate November 11, 1888. The executor named in the will having renounced, proceedings were instituted which resulted in the appointment of Mary Maack, the widow, and John H. Merrow, as administrators with the will annexed. Merrow died May 6, 1890, and Mary Maack April 23, 1893. John F. Maack was appointed administrator *de bonis non* with the will annexed July 3, 1893. Mary Maack died intestate, and letters of administration upon her estate were issued to John Pusback May 29, 1893. Subsequently Pusback filed a petition asking that the administrator, John F. Maack, show cause why he should not judicially settle his accounts; and upon the return of the citation issued thereon the said John F. Maack filed his petition for such judicial settlement, and subsequently his account, showing total receipts by him as such administrator of \$1,858 and total disbursements of \$1,041.51, leaving in his hands for distribution the sum of \$816.49.

Mary Maack, during her administration upon the estate of the testator, paid out, upon his debts, a considerable amount over and above the money coming into her hands from the assets of the estate, and it is claimed by her representative that such overpayment should be determined upon this settlement, and allowed out of the balance in the hands of the administrator with the will annexed before distribution among the legatees. No judicial settlement of the accounts of Merrow and Mary Maack, as administrators, was ever had. It would have been much more satisfactory and methodical had such settlement been made, and the rights of Mary Maack thereby definitely determined, instead of adjusting such rights upon this accounting; but inasmuch as no question of jurisdiction is raised, and all parties interested are before the court, it is proper to dispose of this claim at this time.

There is no controversy over the amount paid out by Mary Maack as such administrator, but it is asserted that a portion of the money so expended by her was derived from a dispo-

sition of the assets of the estate, and, further, that under the provisions of the will, and the terms of the bequest to her therein contained, it was her duty to make these payments out of her individual estate.

The testator died possessed of a farm in the town of Little Valley, incumbered to some extent, and of personal property to the amount of about \$1,700. The first item of the will is as follows: "I grant, devise and bequeath unto my wife, Mary Maack, all my property, of every kind and nature, both real and personal, wherever the same may be, for and during the balance and remainder of her natural life." After various other bequests, the testator, by the fourth item of his will, devised and bequeathed all the remainder of the estate, both real and personal, to his son, John H. Maack. The fifth item of the will is as follows: "And I hereby direct and require my said wife, Mary Maack, at all times during her natural life, to fully pay and satisfy all interest which may accrue upon any incumbrance that may exist upon my estate at the time of my decease, so that said incumbrance may not increase on account of said interest accumulating; and she shall also keep the buildings upon the real estate owned by me at the time of my decease insured fully, in a good and reliable insurance company, and keep the premiums duly paid, and shall keep and maintain my said estate in as good condition as possible, during the continuance of her natural life, consistent with her full enjoyment of the use of the same."

It is conceded that Mary Maack complied with all the requirements of the will relating to the payment of interest and insurance. But it is urged, in opposition of her claim, that, under the statement in the fifth item of the will to the effect that she should keep and maintain the estate in as good a condition as possible during the continuance of her life estate, it was her duty to pay the debts of the testator, and that the same were a charge upon the estate or interest devised to her. This claim is not tenable. The phraseology of the portion of the will re-

ferred to by no means expressly charges the payment of debts upon the widow's legacy, nor do the attendant facts and circumstances indicate any such design on the part of the testator. By the first item of the will the widow is given a clearly-defined interest, viz.: a life estate in all the testator's property. An interest given in one clause of a will cannot be affected by raising doubts from other clauses, but only by express words or undoubted implication. *Freeman v. Coit*, 96 N. Y. 63.

Where an estate is given in one part of a will in clear and decisive terms, such an estate cannot be taken away or cut down by any subsequent words that are not as clear and decisive as the words of the clause giving the estate. *Roseboom v. Roseboom*, 81 N. Y. 356; *Clarke v. Leupp*, 88 N. Y. 228.

The provisions of a will for the support and maintenance of a wife will receive the most liberal construction. *Thurber v. Chambers*, 66 N. Y. 42-48.

After the appointment of Mary Maack and Mr. Merrow as administrators with the will annexed, they caused an inventory to be prepared and filed. Among the effects inventoried are thirty-eight dairy cows, forty tons of hay, two tons of straw, one hundred and fifty bushels of oats, thirty bushels of barley, and various other articles of farm produce upon the farm owned by the testator at the time of his death. This produce was consumed by the widow and her tenant in the occupancy of the real estate. It is asserted on behalf of the administrator, John F. Maack, that the widow should be charged with the value of the articles so consumed. This claim presents an issue very similar to that determined in *Matter of Yates*, 99 N. Y. 95. In that case the testator gave to his widow all of his "estate, both real and personal, she to have and to hold the same and to receive and enjoy as her own property the rents, issues and profits therefrom during life." The testator was seized at the time of his death of two adjoining farms, used together as a dairy farm, and the personal property consisted of live stock upon the farms, and a quantity of hay, oats, corn, wheat and

potatoes. The widow used and disposed of this farm produce, and, upon the settlement of the accounts of the executor, it was sought to charge him with the value of the articles so consumed, upon the ground that they belonged to the estate. In determining this question the Court of Appeals says (page 99, of opinion): "In giving to the widow this real and personal property for her enjoyment during life, we think it was his intention that she should possess and use it in specie. It cannot be presumed that the testator expected these perishable articles would be preserved for the remainderman, or taken from her by the executor for sale, and the interest or income only applied to her use. They were essential to the support of the stock and the carrying on of the farm, from which only the widow's maintenance was to come. . . . It cannot be implied that the testator wished his executor, at the moment of his death, to sell all the personal property and pay over to the wife only the interest which might accrue upon the proceeds, or that he intended to bestow upon her a farm without the means of making it useful, and so, in effect, break up her home, while in words he was securing its continued enjoyment." The rule seems well established that when the articles in question, the use of which are bequeathed for life, are of a wasting character, "*qua ipso usu consumuntur*," which might be exhausted in the lifetime of the tenant for life, the gift to the remainderman must be taken subject to such possibility. Then, again, the evidence affords a complete answer to this objection urged against the claim. For some time prior to the death of the testator, the farm owned by him, and upon which the personal property in question was produced, had been managed and occupied under an agreement that such produce should be consumed upon the farm. This farm was used for dairying purposes, and the raising of hay and grain thereon was merely incidental to the prosperous prosecution of the principal enterprise. The consumption of such produce upon the farm was essential to maintain the soil in proper condition. So that, by the terms

of the agreement under which the property in question was produced, and which agreement was made by the testator, and remained in force until after this produce was consumed, the articles referred to were expressly required to be used upon the farm. No suggestion is made that any portion of this produce was sold or removed from the farm by the widow.

No claim is made but what at the death of Mary Maack there were the same number of cows remaining upon the place as at the death of testator. The evidence indicates an increase rather than a diminution in the extent and value of the live stock. The various articles of farming tools and implements were also left in as good condition as could be expected in consequence of their use upon the place. So that it is entirely plain that nothing can be deducted from the claim of Mary Maack in consequence of the use or consumption of any of the articles above referred to.

The inventory filed contains the following items: Cash on hand in bank, \$296.86; note of C. H. Davis, \$80.14; cash from Lambert Peterson, \$59.76. These items constitute substantially all of the effects inventoried, aside from the stock, farming implements and produce. The inventory was not completed until the 12th day of December, 1889. The appraisers who made such inventory testified: That they had no personal knowledge of the existence of any money or funds in the bank. That their only information upon that subject was hearsay in its character. That their understanding was that this money, wherever it might be, was the fund which had accumulated from the dairy productions between the death of the testator and the making of the inventory; in other words, it was the use or income derived from the estate, and under the will belonged to the widow. It does not appear that the testator had any ready money at the date of his death. On the contrary, the opposite inferentially appears from the fact that, shortly before his death, testator borrowed money with which to pay small bills.

Some evidence is also given to the effect that the item of cash from Peterson is erroneous; that in fact this demand against Peterson had been paid to the testator before his death, excepting the sum of \$15, and that there was only that amount due thereon. The statements in the inventory are only presumptive evidence against the person filing it. They are simple *prima facie* evidence of the value of the assets. The statute expressly provides that such presumption may be overcome, and the statements in the inventory explained (Code Civ. Proc., sec. 1832), and it is entirely apparent that the inventory filed in the case is erroneous so far as it related to the items of cash in the bank and cash from Peterson.

Moreover, it appears from an inspection of the inventory that the appraisers, in preparing the same, neglected to set apart to the widow the \$150 in money or other property to which she was entitled under the statute. The failure of the appraisers in this particular did not divest the widow of her rights, nor was it necessary to make an application to have such inventory amended. Such correction may and should be made upon the accounting, if not before. The statute provides a method of securing the correction of an inventory defective in this particular (Code Civ. Proc., sec. 2720), and it is expressly provided that the decree upon judicial settlement may award to the widow the same relief which might be afforded in a proceeding instituted under the section above cited. Code Civ. Proc., sec. 2721.

While the exact amount of money received by Mary Maack in her administration of the testator's estate is not definitely disclosed, yet it conclusively appears that the funeral expenses paid by her, in connection with the \$150, by far exceeded her receipts. A careful consideration of the entire evidence in the case fails to disclose any valid reason why the representative of Mary Maack, deceased, should not be fully reimbursed for all moneys advanced by her in payment of debts of testator. A

decree will accordingly be entered herein judicially settling the accounts of the administrator, John F. Maack, as filed, and directing that the balance remaining in his hands after payment of commission and expenses of this settlement he pay to John Pusback, as administrator of the estate of Mary Maack, deceased, on the amount due on her claim as determined by the findings filed herewith.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Accounts of
ISRAEL HUNTLEY, as Executor, etc., of ROXANA DUELL,
Deceased.

(Surrogate's Court, Rensselaer County, Filed June, 1895.)

1. EXECUTORS—ACCOUNTING.

The "actual and necessary expenses," for which an executor will be reimbursed, are those which were contracted in good faith and with reasonable judgment, whether with or without the advice of counsel.

2. SAME.

Expenditures made by an executor in the defense of claims against the estate, although incurred by advice of counsel, should not be allowed to him where, in the management of his own affairs, under like circumstances, he would not have incurred them.

Judicial settlement of the accounts of an executor.

McClellan & Albertson (William J. Roche, of counsel), for executor; John E. Hoag, for Sarah E. Vallee, creditor; John T. Norton, for George H. Palmer, creditor.

LANSING, S.—The executor filed his account, duly verified. The creditors filed objections to certain items of credit for costs and disbursements alleged to have been paid by the executor in

litigating the bill of the undertaker for the funeral expenses of the deceased. The creditors insist that such payments were unjustifiable, that the expenditure of nearly one-half of the small estate of about \$800 in fruitless litigation over the undertaker's bill was unwarranted in law, and amounted to a breach of duty on the part of the executor, and that credit should not be allowed him therefor.

On the other hand, the executor contends that he acted in entire good faith and under the advice of counsel in conducting the litigation and making the expenditures, and that he should be credited with the amount so paid by him.

The question presents some embarrassing features. The office of an executor or administrator is a position of responsibility, and its duties are often delicate and exacting. Such positions are rarely sought, especially where the estates are small, and in such cases the compensation is usually very inadequate for the responsibility assumed and labor performed. The law is, therefore, indulgent where it appears that the trustee has been prompted by proper motives and has exercised reasonable judgment. On the other hand, the law condemns every act savoring of dishonesty or negligence in the administration of the trust whereby loss is suffered. But honesty, good intentions, and even advice of counsel, are not always sufficient, where loss has occurred to the estate through mismanagement. The law in addition requires that persons who accept such positions must, in the performance of their duties, be held to exercise a reasonable measure of intelligence, and such ordinary discretion and judgment as men usually exercise in the management of their own affairs. The expenditures in question, if allowed, must be allowed under section 2730 of the Code of Civil Procedure, as amended in 1893, which provides that executors and administrators may be reimbursed out of their estates for such "actual necessary expenses" incurred by them as "appears just and reasonable." This provision, though recently embodied in the Code, has long been a well-settled rule in equity. Young

v. Brush, 28 N. Y. 667, 673. It also existed in a statutory form for many years prior to its re-enactment in the Code. 2 Rev. St. 93, sec. 58, as amended by Laws 1863, chap. 362.

The application of this provision to expenditures by executors and trustees for legal services is, I think, well stated in the case of *St. John v. McKee*, 2 Dem. 236.

ROLLINS, S., says: "The bare fact that an executor has actually expended for legal services the sum for which he asks to be reimbursed does not, of itself, entitle him to reimbursement, nor, indeed, does he become entitled simply by showing, in addition, that he has acted honestly and in good faith. If objection is interposed it must also be made to appear that when the services were rendered they were demanded or seemed to be demanded by the best interests of the estate."

The case of *O'Conner v. Gifford*, 117 N. Y. 278, cited by the counsel for the executor in support of his contention, is a case where an executor was sought to be charged on account of his failure to collect alleged collectible assets of his estate. It must be conceded that the rule of duty and diligence imposed upon an executor or administrator is the same whether a claim is prosecuted or defended, and that the rule laid down in that case should apply here.

But I am sure the rule laid down in that case is not in conflict with the rule above stated.

PECKHAM, J., in the case cited, states the rule as follows: "An executor who has acted in good faith, and intended fairly and fully to discharge his duty, will not be charged in this manner (as for devastavit for a failure to collect money), if such intention has been directed by reasonable judgment;" and he quotes with approval the case of *Schultz v. Pulver*, 11 Wend. 363, a case where an executor was charged with misconduct in neglecting to take legal proceedings for the recovery of property, and the court, by NELSON, J., say that "the executor must act in good faith and with reasonable judgment," to be exonerated from the charge.

The result, upon reason and the authority, seems to be that those "actual and necessary expenses" for which an executor must be reimbursed are those which are contracted in good faith and with reasonable judgment, whether with or without the advice of counsel. It is well settled that the reasonable and necessary expenses of the burial of a decedent are a charge against his estate, although the executor is primarily liable as an individual, and not in his representative character. He must decide upon the amount to be expended, and pay it, and such sum will, if proper in amount, be allowed him on the final settlement of his accounts. *Ferrin v. Myrick*, 41 N. Y. 315; *Patterson v. Patterson*, 59 id. 574.

This brings us to the real question in this case, which is, did the executor exercise reasonable judgment and discretion in entering upon the litigation, and incurring an expense of several hundred dollars in contesting the payment of the bill of the undertaker?

The facts in the case are these: The undertaker presented a bill to the executor for \$127 for funeral expenses. The bill appears to have been contracted by a Mrs. Vallee, who resided in the same house with the deceased, and attended her during her illness, and who was a relative of the decedent's late husband. The executor learned of the order shortly after it was given. He lived about six miles from the deceased, and when he heard of her death, which was telephoned him by Mrs. Vallee, he spoke to an undertaker residing near him in Sandlake to attend the funeral, but when he learned on his arrival at the house of the deceased that Mrs. Vallee had gone to Troy to engage an undertaker and make arrangements for the funeral he countermanded his own order, and Mrs. Vallee contracted the bill in question.

It further appears that Mrs. Vallee stipulated with the undertaker that she should not be personally charged with the bill, but the undertaker should look to the estate, and the executor had knowledge of this arrangement before the suit was brought.

The entire estate consisted of \$827 in money. The bill was presented to the executor, and payment was refused on the ground—First, that it was excessive; second, that the services and material of the undertaker having been ordered by Mrs. Vallee, the undertaker must look to her for payment, and when paid the executor would be liable to her for the reasonable funeral expenses of his decedent. Suit was brought, and the case was referred. The referee reported in favor of the plaintiff for the amount of the bill with interest. Judgment was entered thereon for damages \$131.69, costs \$188.69, amounting together to \$320.38. An appeal was then taken by the executor to the General Term, where judgment was affirmed, with costs. The entire expenditure by the executor in this litigation in excess of the claim of \$127 is about \$450, including \$100 paid to his own counsel for his costs and services on the trial and on the appeal.

Claims of creditors to the amount of about \$500 have been admitted or established.

The defense that an action would not lie against the executor in the first instance, but should have been brought against Mrs. Vallee, was obviously untenable, since it appears that the executor impliedly authorized her to act for him by revoking his own order and accepting her services in the employment of the undertaker. Beyond that, it is a well-settled elementary principle that an executor is liable for reasonable funeral expenses of his decedent, whoever may have ordered the same, whether with or without his knowledge or consent. Redf. Law & Pr. Sur. Cts. (5th ed.) 438; *Patterson v. Patterson, supra*; *Ferrin v. Myrick, supra*.

This litigation had its origin in an idea which, I think, obtains quite generally among executors and trustees, and perhaps to some extent in the legal profession, that an executor or trustee may safely litigate any fairly controvertible question of law or fact arising in the course of administration, without the lia-

bility of having his action called in question, provided he acts in good faith and under the advice of counsel.

I am satisfied this is not the law. It would be establishing a very dangerous precedent to hold that an executor could, on the plea of acting in good faith and under advice of counsel, fritter away an estate in litigations over claims of trifling amounts. A reasonable test in such case is, would the executor or trustee, in the management of his own affairs, under like circumstances, have incurred the expense in question? If not, then he certainly should not be credited with it in his account as executor or trustee. Besides, in cases of doubt, it is the right, if not the duty, of the executor or trustees to seek instruction from the court as to his duty in the premises. Code Civ. Proc., sec. 2472, subd. 3; *Matter of Underhill*, 117 N. Y. 471.

I am free to concede that the rule must not be drawn with too much strictness, but, making the most ample allowance for honest intent and reliance on advice of able and experienced counsel, and the additional fact that the executor acted in the premises under the belief that he was proceeding within the lines of his powers and duty, yet it seems to me that when the matter was submitted to a referee of experience and ability, and half a dozen witnesses testified to the value of the services rendered and the material furnished, and the referee found that the amount charged and expended was reasonable and in accordance with the rank and circumstances of the deceased, and also found as a conclusion of law (about which there could be no question) that the executor was primarily liable for the funeral expenses ordered, then, at least, this litigation should have ended, and I cannot conceive of any reasonable excuse for the expenditure of a large additional sum from the money of this estate in printing the case and taking an appeal to the General Term of the Supreme Court. The line must be drawn somewhere, and perhaps for safe precedent it should exclude the expenditure of this entire litigation, and hereafter, in a like case, with the law touching the duties of an executor or trus-

tee in the premises clearly defined, the line will be so drawn. But, in view of the hardship involved, the good faith of the executor, and the high character, learning and ability of the counsel, I have, under all the circumstances, decided after considerable hesitation to allow the expense of the litigation in the Supreme Court. There was, perhaps, a slight question of fact as to whether the expense incurred was in accordance with the rank and circumstances of the deceased, also whether the undertaker had not charged in his bill for the casket more than the agreed price. When these questions were settled by a preponderance of evidence upon the reference, there was not the slightest ground remaining for further litigation, and I must, therefore, strike from the executor's account all expenditures in excess of the damages, costs and disbursements included in the judgment entered upon the reference in the Supreme Court, and the disbursements of the executor for the services of his attorney in attending upon the reference.

Decreed accordingly.

(Note.—On allowances to executors for counsel fees:)

Executors are entitled to be reimbursed for reasonable counsel fees incurred by them in actions or proceedings involving the construction of wills to which they were made parties. (Matter of Hutchison, 84 Hun, 563.)

They are entitled to carry to the Court of Appeals a novel point of law on which the surrogate and the General Term differed, and should be reimbursed the expense thereof although they were defeated and were personally interested in the result. (Matter of Blair, 28 Misc. Rep. 611.)

Only reasonable and necessary counsel fees and disbursements can be allowed (Matter of Spooner, 86 Hun, 9); and the compensation is to be measured by the ability and success of the attorney and the size of the estate. (Matter of Jones, 28 Misc. Rep. 599.)

An executor should not continue litigation after one appeal has settled the law against him, where the expense will exceed the claim. (Gross v. Moore, 14 App. Div. 353.)

Nor can he be allowed expenses in an action unnecessarily brought by him for construction of the will, especially where the principal object of the action was to further his personal interests. (Matter of Thrall, 30 App. Div. 271.)

In the Matter of the Estate of J. WESLEY STILLWELL, Deceased.

(*Surrogate's Court, Schuyler County, Filed June, 1895.*)

TRANSFER TAX—PARENTAL RELATION.

The exemption in the Transfer Tax Law in favor of persons toward whom testator has stood for ten years in the mutually acknowledged relation of a parent is not limited to illegitimate children, but includes any person who has been brought up by him as a child for the requisite time, and who has recognized him as a parent.

Proceeding to subject the estate of J. Wesley Stilwell, deceased, to taxation under the transfer tax law.

O. P. Hurd, for contestants.

KEELER, S.—It is claimed, and so found in the report of Owen Cassidy, Esq., appraiser, that the devise in the will of the testator to Charles P. Spaulding is wholly exempt from taxation, and the legacy to Mrs. Georgia A. Tunison is only subject to a tax of one per cent., upon the ground, as to each of these persons, that for more than ten years prior to his death the testator stood towards them in the mutually acknowledged relation of parent, within section 2, ch. 399, Laws 1892.

It has been recently decided by the General Term, Supreme Court, First Department, in Matter of Hunt's Estate, 86 Hun, 242, VAN BRUNT, J., writing the opinion, that none but illegitimate children of the "decedent, grantor," etc., are entitled to the benefit of this exemption. We should consider ourselves

bound to follow this decision were it not that the General Term, Second Department, in *Matter of Butler*, 58 Hun, 400, has taken a different view of the statute in question. With these two departments of the Supreme Court in opposition, we may treat it as an original question.

We think the more reasonable construction, and the better reasoning, is that of DYKMAN, J., in the *Butler* case, and that of Surrogate KENNEDY in *Matter of Spencer's Estate*, 21 St. Rep. 145. Surrogate KENNEDY argues that the word "acknowledged," as used in the statute, means to "admit or recognize" and that such recognized relation may be proven by agreement in writing or by parol, by declarations of the parties and by their acts and conduct. In *Butler's* case, DYKMAN, J., says (page 413, 58 Hun): "The word 'mutual' in the statute has no abtruse signification. It means and requires reciprocity of action, correlation and interdependence, and finds its best illustration in the relations existing between parents and children, which are always mutual." Surrogate KENNEDY's decision in *Spencer's* case is discussed and approved. VAN BRUNT, J., in *Hunt's* case, does not notice these cases, nor any of the numerous reported cases upon the question. He argues that the word "acknowledged" is only used in relation to a "fact," and claims that the "illegitimate" child is the "fact." He says you can only prove the "mutually acknowledged relation" by showing secret illegitimacy, and ten years' acknowledgment by each. This, he argues, makes it mutual, and a fact.

The statute says that the "mutually acknowledged relation" is the fact. How it shall be proven is not stated in the statute. The "mutual acknowledgment" does not make or change any "fact." The child is not thereby rendered legitimate. Why we should try to extract some hidden, out of the ordinary, meaning from the words used, or why the legislature should have used such a roundabout form of expression, if they meant to be understood as Mr. Justice VAN BRUNT argues, we cannot

understand, nor does he make it plain to our comprehension. Why does the statute use the words "any person?"

The learned justice says (86 Hun, 242): "That the question of legitimacy was in the minds of the framers of the statute is manifest from the next clause of the section in question," referring to the clause as to "lineal descendants born in lawful wedlock," etc. It was no doubt in the minds of the framers of the original statute, but the exemption in favor of adopted children and that in favor of the "mutually acknowledged" child were not in the original act of 1885 (chapter 483). These exemptions were created by the act of 1887 (Laws 1887, ch. 713), and the only material change made by that act, as to exempt persons, was the adding of the adopted child and the mutually acknowledged relation. The limitation in the exemption of lineal descendants to those born in lawful wedlock had been already in the original act. The repeated portions in the act of 1887 are not to be considered as re-enacted, but as having been the law from the first, and the new provisions are considered to be enacted at the time the amended act took effect. *Ely v. Holton*, 15 N. Y. 595.

The original act (1885) exempted two classes: Those who might under the statutes of descent and distribution be entitled to share in the estate of a decedent, and "the wife or widow of a son, and the husband of a daughter,"—relatives by blood, and those of affinity by marriage. *DANFORTH, J.*, in *Matter of Miller*, 110 N. Y. 222. The act of 1887 exempted another class,—the adopted child, and the child that for a certain long period had been recognized and treated as an adopted child, although there had been no formal writing, etc., as required by statute. The authors and framers of the legislation for this class do not seem at all to have had in mind any question of legitimacy or blood; hence the adopted child or children; hence adoption, not under State laws, but in conformity to the laws of this State; hence the mutually acknowledged were exempted by the same act, and in the same paragraph, with the adopted

child; hence the words "or any person" were appropriately used. Therefore ten years was fixed upon as the time of its continuance. As some time must be arbitrarily named, the long time would guard against imposition and fraud.

But suppose we take Judge VAN BRUNT's interpretation,—after the person claiming the exemption has satisfactorily proven himself or herself the illegitimate child of the "decedent, grantor," etc., why the necessity or reason of a mutual acknowledgment, continuing for ten years, or any number of years?

The opinion further says, 86 Hun, 242: "It is significant that the words 'lawful wedlock' are used in respect to the matter of lineal descendants immediately after the mutual acknowledgment and that it had not been at all considered necessary to refer to it when a child or children were spoken of in the previous part of the section. It is evident that it was intended to limit the exemption of illegitimate descendants to the child, and not to extend the same to the descendants of such child."

As we have stated, the "born in lawful wedlock" clause was in the original act, but the "mutually acknowledged" part was not enacted until two years later. Possibly this is not material in considering the strength of the argument. If we actually comprehend the reasoning of the learned justice, it is strong to prove that the term "child or children" spoken of in the previous part of the section included the illegitimate as well as the legitimate child. The argument is that the word "child," etc., is not limited by the words "born in wedlock," which words prevent the exemption extending to the illegitimate descendants of the child.

The reasoning has no weight in support of the construction claimed. It has not yet been decided, so far as we are aware, that it is not the correct interpretation of the statute that the word "child" includes the illegitimate child. But, in that view, what was the necessity or reason of this long "mutually acknowledged" clause, if its purpose be only to exempt the illegitimate child?

We doubt if courts can assume that in all cases legislators study a lexicographer as to the language employed in framing laws; still, it is legitimate argument. The word "acknowledged" is not always used in the sense of admitting some secret truth or fact. The lexicographer cited by Judge VAN BRUNT gives the following as the definition of the word: "(1) To own or admit the knowledge of; to recognize as a fact or truth; to declare one's belief in; as, to acknowledge the being of God. 'I acknowledge my transgressions.' Ps. li. 3. 'For ends generally acknowledged to be good.' Waverly. (2) To own or recognize in a particular character or relation; to admit the claim or authority of; to give recognition to. 'In all thy ways acknowledge him.' Prov. iii. 6." The quotation of the learned justice is from the "synonyms," contrasting the word "acknowledge" and the word "recognize."

The testator never had any children. There were two (Charles P. Spaulding and Georgia A. Tunison) taken into the testator's family and home when respectively about seven years of age. They each became, in all respects except blood, as children of the family. The testator educated and clothed and provided and cared for them in sickness and in health, and they each rendered to the testator and his family the usual services and filial attention, affection and obedience of a child, without any expectation of pay on either side. The girl usually addressed the testator as "papa," and he always spoke of her as his daughter and child; and as to the boy, Spaulding, the testator said that he regarded him as his own child, and intended to do by him as he would do for his own child. We think the facts bring these two (devisee and legatee) within the meaning and intent of the exemption clause in question. That much property otherwise taxable is unjustly escaping taxation through the elastic qualities of the statute as thus construed is an argument to be addressed to the legislature rather than to the courts.

Ordered accordingly.

Note.—It was at first held by the General Term of the Supreme Court that the exemption as to persons toward whom a testator stood in the mutually acknowledged relation of parent and child applied only to illegitimate children. *Matter of Hunt*, 86 Hun, 232; *Matter of Beach*, 19 App. Div. 630; *Contra*, *Matter of Nichols*, 91 Hun, 134.)

But the question has now been settled by the decision of the Court of Appeals in *Matter of Beach*, 154 N. Y. 242, holding that such exemption is not confined to illegitimate children, but extends to persons not of the testator's blood between whom and testator the relation had existed for the requisite time.

In the Matter of the Probate of the Will of JOHN OLIVER,
Deceased. .

(*Surrogate's Court, New York County, Filed July, 1895.*)

WILL—PROBATE.

Where one of the subscribing witnesses is dead and the other has not been heard from in six years, the will may be admitted to probate on proof of the handwriting of the testator and witnesses, and declarations of testator as to its execution.

Proceeding for the probate of a will.

David May, for proponent; James E. Kelley, special guardian, opposed.

FITZGERALD, S.—The paper propounded was executed in 1885. The decedent was a steamboat man, doing business between Albany and New York. His wife, at the date of the instrument and afterwards, was a person of unsound mind, and she continued in the same condition more or less until her death. He left a son, who was also of unsound mind, and an inmate of an institution for the insane. The estate, by the

paper, was left in trust to his daughter, Mrs. Fyle, to be expended by her as she might deem wise for the maintenance of his wife; and upon her death, should there be any residue, it is to go to Mrs. Fyle, with the understanding that, should the son require any assistance, she should devote what would seem to be proper for that purpose. Mrs. Fyle is named as executrix. The paper was attested by John Featherly, Jr., and S. V. R. Ableman, as witnesses. Ableman died soon after the death of the decedent, and the witness Featherly disappeared, and has not been heard of for six or seven years. The legal presumption under the circumstances is that he also is dead. There is no person living who is known to have been present at the execution, and there is no written recital in the instrument of the facts which occurred at the time. Only the handwritings in the signatures of the testator and the subscribing witnesses are proved. Objections were filed to the probate of the paper in behalf of the widow, alleging that it was not properly executed. She has since died. The special guardian of the insane son has continued the contest.

Under the laws of this State, before admitting a testamentary paper to probate, two, at least, of the subscribing witnesses, must be produced and examined if so many are within the State. Code, sec. 2618. The surrogate must be satisfied of the validity of its execution. Section 2622: To constitute a valid execution, the testator must sign the instrument at the end, or acknowledge his signature to each of not less than two witnesses, and must at the time declare to them that it is his will, and the witnesses shall sign it at the end by the testator's request. 2 R. S. 63., sec. 40. It frequently happens that, in a literal sense, these requirements are not complied with. In a liberal sense the courts hold that a substantial compliance is sufficient. *Matter of Voorhis*, 125 N. Y. 765.

That testamentary purpose may not miscarry, the law, in the spirit of equity and justice, provides that if all the subscribing witnesses are dead, a will may, nevertheless, be established upon

proof of the handwriting of the testator and the subscribing witnesses, and "such other circumstances as would be sufficient to prove the will upon the trial of an action. Code, sec. 2620. This provision is a substantial reproduction of the language of section 20, chap. 460, Laws of 1837, which has been a subject of adjudication in our courts when it was sought to introduce wills in evidence in trials at law.

In *Jackson v. Le Grange*, 19 Johns. 386, one of the witnesses to the will was dead, and the second failed to recall the circumstances attending the execution. Because the third witness, who was shown to be living and within the jurisdiction of the court, was not called, that "he might prove or disprove the facts," the will was not received in evidence. But the court was of the opinion that if the recollection of the third witness had also failed, if he could prove his own signature and that of the testator, the execution of the will was sufficiently proved to entitle it to be read. In a summarized statement of the law, Chief Justice SPENCER, who delivered the opinion of the court, said: "If the subscribing witnesses to a will are dead, then proof of their signatures and that of the testator is sufficient." *Jackson v. Vickory*, 1 Wend. 406, is a similar case. The court held, that when one subscribing witness was unable to prove that all the requirements of the statute had been complied with, the other witnesses to the transaction, if living and within the jurisdiction of the court, ought to have been called; but, if they were dead, then their handwritings and that of the testator should also be proved, and the jury, from such evidence, would be authorized in inferring that the requirements of the statute had been complied with. In *Jauncey v. Thorne*, 2 Barb. Ch. 59, the chancellor states that the most liberal presumptions in favor of the due execution of wills are sanctioned by courts of justice where, from the lapse of time or otherwise, it may be impossible to give positive evidence on the subject; and, where any of the subscribing witnesses are dead, proof of their signatures is received as secondary evidence of the facts to which

they have attested in subscribing the will as witnesses of its execution. So, in *Cheaney v. Arnold*, 18 Barb. 438, it is held, if the witnesses were all dead, proof of their handwriting would be sufficient to establish the due execution of the instrument by the testator. And, again, in *Everitt v. Everitt*, 41 Barb. 385, "If the witnesses are men of good character, and there is no doubt as to their signatures or any other suspicious circumstance, the attestation clause would be deemed sufficient evidence of a request. In short the law lays down no stubborn inflexible rule in such cases, but accepts the best evidence that can be procured, subject to the nature of human affairs and human infirmities and casualties, to establish the fact in controversy." "Nor are the provisions of the statute," as stated in *Lawrence v. Norton*, 45 Barb. 448, "such as to preclude the admission of the will when some of the witnesses are dead and others do not remember the occurrence."

In *Butler v. Benson*, 1 Barb. 526, it was held that the law, after the diligent production of all the evidence then existing, if there were no circumstances of suspicion, presumed the instrument properly executed, particularly when the attestation clause was full. To the same effect are *Rugg v. Rugg*, 83 N. Y. 549, and *Matter of Pepoon*, 91 N. Y. 255; and in most of the cases in which validity of the execution of a will was in question, when there was no witness living to prove the facts, the existence of an attestation clause, reciting the necessary facts that occurred at the time of the execution, has been an important factor in determining the decision of the courts.

But to give the attestation clause force as evidence is a generous interpretation of the statute, in the language of which there is nothing to make it such. It is "proof of handwriting" that is prescribed. It is only under the decisions that an attestation certificate signed by the witness is admitted in aid of probate, for it is well settled that an attestation clause is no part of a will, and is not required as part of its execution, but,

when the witnesses are dead, it may be presumptive evidence of due execution (Jackson v. Jackson, 39 N. Y. 153); and, when the witnesses are living, it ~~may enable~~ them to recall the facts, if they do not recollect them without. Under the statute, all that is required in addition to proof of the handwriting of the testator and the subscribing witnesses is "such other circumstances as would be sufficient to prove the will upon the trial of an action."

What were the circumstances under which the will of John Oliver was prepared and executed? An insane wife and an insane son were not competent for self-care to look after an estate. Mr. Fyle, the son-in-law of Mr. Oliver, and who at his request drafted the paper, stated that in giving him the instructions Mr. Oliver referred to his wife's mental condition, stating that it was his wish to give his estate out and out to Mrs. Fyle, and that it was at his (Fyle's) suggestion that the paper took the form in which it was executed, and by which provision for his wife and son was made directory. To some one must be entrusted their care, and who was better fitted than the daughter and sister of the unfortunates?

Mr. Fyle is a journalist and a literary man, not a lawyer, though he states he knew the manner in which wills should be executed. The scheme of the instrument is clearly expressed. If Mr. Fyle's testimony is to be credited, after the paper was typewritten, it was delivered to Mr. Oliver, as he was about to leave for Albany, with instructions as to the manner of its execution. From the fact that both subscribing witnesses were residents of that city, it is a reasonable conclusion that the paper was signed there. Mr. Oliver, on his return to this city, Mr. Fyle states, came to him, and stated that the paper had been executed there, and told him the manner in which it was done. Though Mr. Fyle's statement did not in the first instance mention that the decedent told him that he had requested the witnesses to sign the paper, before he left the stand he recalled and testified to the fact; and it is hardly conceiv-

able, under the circumstances, that they would have signed their names except upon his request.

I am aware that the competency of proof of the declarations of a testator has been called in question in the past. In the leading case of *Waterman v. Whitney*, 11 N. Y. 157, the subject was learnedly considered by Judge SELDEN in respect to the declarations of a testator after the execution of a will, to the effect that he had disposed of his property in a manner entirely different from the disposition shown in the will; and it was held that no such declarations were competent as evidence of the facts, except they were part of the *res gestae* at the time of the execution, but were competent as evidence of the testator's mental condition.

The question was again considered in *Matter of Marsh*, 45 Hun, 107, in a proceeding to establish a lost will. On the trial, the declarations of the testatrix, made from time to time and to within a short time of her death, that she had made a will, and had given her property to the person who was named therein, were admitted. Judge BRADLEY, who delivered the opinion of the court on the appeal, draws a distinction between declarations of a testator, the purpose of which is to work the revocation of a will, and those which tend to sustain it. In my view, his reasoning is correct. But the declarations of Mr. Oliver were taken without objection. Under the decision in *Matter of Marsh*, *supra*, they would have been competent, even if objected to.

But on the main point—that of execution—I have found no case in this State all the facts of which are like the one before me. *Matter of O'Hare*, 2 Law Bul. 83, decided by Surrogate CALVIN, was one in which the two subscribing witnesses had died, but whose handwritings were proved. It was shown also that one of the witnesses was an attorney, and that the instrument was found among the decedent's private papers after his decease. The question at issue was whether, upon these facts alone, there was sufficient proof of the handwriting of the testator as would be proper to prove the will on a trial at law under

the statute. The surrogate held that the language of the statute seemed to qualify the requirements and assimilate the proof to that necessary on a trial at law, and he was of the opinion, if it should be impossible to prove the handwriting of the testator, that fact would not present an insuperable obstacle to clear proof of the instrument and its admission to probate as a will of personal property.

In *Rider v. Legg*, 51 Barb. 260, it was held that the proof of the signatures of two of the three subscribing witnesses to a will, and who were deceased, was sufficient, after a lapse of time, to justify the reception of the will as evidence, without proof of the signatures of the other subscribing witness and of the testator.

But the case, the facts of which are nearest like those of the one before me, is found in the English reports,—*The Goods of Jane Thomas*, 1 Swab. & T. 225. In that case there was no attestation clause. Two witnesses were dead and the third testified that he remembered being requested by the testatrix to attest her signature to the will, and that she did not sign her name in his presence, and that he thereupon subscribed his name in her presence. After an interval of so many years, he was unable to recollect all the circumstances attending his subscription; but, as he remembered, the testatrix and he were the only persons present at the time, and that the signatures of John and Mary Skeggs, which appeared subscribed to the will immediately under his signature, were not subscribed in his presence. He did remember that he made a suggestion to the deceased, at the time he subscribed the will, that another witness ought to be present, but what further passed on the subject he was unable to recollect. It appeared from the case that both John and Mary Skeggs were dead, and that they had been people of some consequence. Their handwritings were proved. Sir C. CRESSWELL, in deciding the case, said: "I think I may fairly assume that the will was duly executed. The first subscribing witness, who survives, states in the affidavit that he explained

to the testatrix that two subscribing witnesses were required to be present at the execution of a will, and it appeared that some time afterwards the testatrix obtained the signatures of two other witnesses. It is a fair presumption that she acted upon the information given her, and got the last two witnesses, in order that she might acknowledge her signature in their presence." Probate was granted.

The liberality of the courts in their desire to sustain testamentary instruments, when there are no circumstances of suspicion attaching to the execution, is illustrated by another English case,—*The Goods of Ashmore*, 3 Curt. Ecc. 756,—in which the will was attested by the marks of the two subscribing witnesses, both of whom were dead, and there was no person living who was present at the execution to testify to the making of the marks, and yet the will was admitted to probate. Applying the principles stated to the case under consideration, I have no doubt of what my determination should be. I have before me proof of the handwritings of the testator and of the deceased witnesses; a will reasonable in its provisions, when the circumstances of the family are considered, the scheme of which was suggested in part, but as a whole was approved by the testator; his declarations as to the manner in which it was executed, showing that he knew the requisites of execution, and that all the acts were in conformity with the statute; and the whole transaction, from beginning to end, in apparent good faith, with nothing to raise a suspicion to the contrary; and the paper was preserved for ten years with no suggestion of dissatisfaction with its provisions. These facts, under the decisions, would be ample proof to admit the will in evidence on the trial of an action, when its admission might go far to determine, if it would not be conclusive of, the rights of the parties to the controversy; and under section 2620 of the Code, already cited, the facts are equally effective to prove its execution in a special proceeding on the probate of a will in this court.

I hold that the will was duly executed, and I will sign a decree admitting it to probate.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Accounts of
JOHN H. BRAUNSDORF, as Sole Surviving Executor of
JULIUS E. BRAUNSDORF, Deceased.

(Surrogate's Court, Rockland County, Filed July, 1895.)

1. EXECUTORS—EXTRA COMPENSATION.

Where an executor, at the request of the heirs, continues a manufacturing business of the testator and renders services for which he is peculiarly fitted by a mechanical training, he is entitled to reasonable compensation therefor, in addition to his commissions.

2. SAME—DISTRIBUTION.

As between the life tenant and remaindermen, repairs which permanently improve the real estate should be charged to principal, and not to income.

3. SAME—PAYMENT OF DEBTS.

Where the next of kin and heirs at law are the same persons and they have received their respective shares of the personal property, it is immaterial that the proceeds of a sale of realty were used to pay debts.

4. SAME—CREDITS.

An executor should be credited with the expense of erection of a building needed for use as a storehouse for estate property, and which was of benefit to the estate and sold for an advance over its cost.

Judicial settlement of accounts.

Garret Z. Snider, for executor; I. Newton Williams, for contestants; A. X. Fallon, for special guardian.

TOMPKINS, S.—Julius E. Braunsdorf died at Pearl River, Rockland county, N. Y., on the 30th day of August, 1880, leaving a will by which his widow (Julia Braunsdorf) and John H. Braunsdorf were made executrix and executor.

Julia Braunsdorf died on the 13th day of June, 1891. By his will the testator devised and bequeathed all his estate, real and personal, to his executors in trust, "to have the custody, care and management thereof, and to collect and receive the rents, income and profits thereof, and pay all necessary expenses and charges for the proper care and preservation thereof, and, after the payment of such charges and expenses, to pay over, on the first day of December of each year, from such net income, to my mother, Henrietta W. Braunsdorf, the sum of three hundred dollars, during her natural life."

All the remainder of said income was given to his widow, for her maintenance and use so long as she should remain his widow, and after the death of the widow to his children; one of his daughters, Wilhelmina, however, to receive only the income of her share.

The mother died prior to the death of the widow. The surviving executor, John H. Braunsdorf, now makes and renders an account of his proceedings as sole surviving executor.

At the time of the death of the testator the widow was occupying the homestead farm, at Pearl River; and living with her were several of the testator's children, then under age, and some of them quite young.

At the time of the testator's death, and for some time prior thereto, he was engaged in the manufacture of machinery, and occupied a factory for that purpose at Pearl River. At the time of his death there was a large quantity of goods and material which had not been made up, and which were of little, if any, value in that condition. It is substantially conceded that the stock and merchandise in the factory at the time of the testator's death, in process of manufacture, were valueless, except as junk, unless made up.

For some years prior to the death of the testator, John H. Braunsdorf, the executor and the testator's eldest son, had been in his father's employ as a machinist, in this factory.

After the death of the testator, the executor, John H. Braunsdorf, with the consent of the widow and all of the children, continued the business until the widow's death, in June, 1891. For a short time he employed a number of hands in the factory in making up the unmanufactured stock and completing unfinished machinery, and in filling unfilled contracts and orders.

Some of the executor's brothers worked in the factory with him after their father's death, and received wages from the executor. It was at the request of the widow and William Braunsdorf, who was then of age, and the other children, who are contestants in this proceeding, that the executor, John H. Braunsdorf, continued the manufacturing business. The will did not require or provide for a continuance of the business by the executor.

The testimony of the executor, which is uncontradicted, shows that it took seven or eight years to make up and complete the machinery, of which certain parts were in stock at the time of the testator's death. This he did, and during the early part of the time he had a number of persons employed in the factory; he himself acting as superintendent and working, and devoting all of his time to the business, as a skilled machinist. Afterwards, and during the greater part of the time, he had but one or two persons, besides himself, working in the factory.

Immediately after the testator's death it was agreed between the widow and the children who were of full age that the executor should continue to receive the sum of eighteen dollars per week for his services as a machinist in the factory, that being the amount which he had received from his father during his lifetime. After about a year, and the orders which had not been filled at the time of the testator's death were completed, William Braunsdorf suggested that, for the further services of the executor in making up the unfinished parts of machines

then in stock, he should receive the sum of twelve dollars per week, instead of eighteen dollars per week. This was agreed to, and the executor continued the business, down to the death of the widow, without any objection on the part of any of the children, who had in the meantime all become of age.

From the time of the testator's death the net income of this manufacturing business was paid by the executor to the widow, and was used by her in the support of herself and children upon the farm.

In the account the executor charges himself with the amount of the inventory, to wit, \$21,953.09, and with the sum of \$9,467.43, increase over inventory; also, with \$5,450.31, being amounts received from sale of property and collection of accounts not inventoried, which amount also includes the net profit of the manufacturing business carried on by the executor as aforesaid.

The first objection made by the contestants is that the account should be surcharged with the sum of \$7,344, being the amount retained by the executor for wages, out of the proceeds of the manufacturing business, during the time he carried it on as aforesaid.

The executor, by his account, gives no items of the manufacturing business; nor does this account show that he paid himself anything for the service thus rendered, but shows simply a net profit of \$2,289.35.

The contestants, by their examination of the executor, have shown that, out of the gross receipts of the manufacturing business, the executor has retained the sum of \$7,344,—being at the rate of eighteen dollars for the first year, and twelve dollars per week thereafter; and the contestants now seek to charge the executor with that amount, on the ground that he is not entitled, for whatever services he may have rendered, to more than the commissions allowed by law.

I am of the opinion that the account should not be so surcharged. The will did not require the executor to continue the

business. He did it on his own responsibility, and, if there had been losses to the estate by reason thereof, he would have been personally liable. He is chargeable with all the profits; the business was profitable, and he charges himself therewith.

In *Munzor's Estate*, 4 Misc. Rep. 374, 25 N. Y. Supp. 818, it was held: "Where an administrator continues the business of his intestate, it becomes his individual business, though the estate is entitled to the profits; and therefore the administrator, on accounting, need not state the details of the business, or produce vouchers for the disbursements thereof."

On the question of the executor's liability for the wages retained by him, I find the facts to be as follows: The testator had carried on the business of manufacturing machines for some years before his death, and from the income thereof supported his family. The executor worked for him as a skilled machinist, received for his services eighteen dollars per week. Upon the death of the testator there were a lot of unfinished machines in the factory, and a large lot of material in course of manufacture, and a lot of unfilled orders for complete machines. The widow, with five of the minor children, continued to live upon the farm near the factory. There was but little property from which any income could be derived for their support but the factory. It was agreed between the widow and William Braunsdorf and Mrs. Deckelman, children who were of full age, and Henry Braunsdorf, who was about eighteen years of age, that the executor should continue with the business, supplying the unfilled orders, and completing the unfinished machinery, and that he should receive the same wages paid to him by his father, to wit, eighteen dollars per week.

The executor continued the business for about a year, paying the net income to the widow, who in part supported herself and children therewith. During that time two of the three other children worked in the factory, and received their wages from the executor, and thus the business was carried on for about a year. Then it was suggested by William that, inasmuch as

most of the large orders had been filled, \$12 per week would be sufficient compensation for the executor, which was agreed to; and from that time until the widow's death, in June, 1891, the business was carried on by the executor, he also doing outside jobbing, etc., and paying all the net income to the widow.

After the children grew up and left the old home they frequently returned, and in the summer lived for weeks and months at a time with the mother, without paying board, the expenses of the household being met in part by the receipts from the factory. At one time William said to the executor: "John, we cannot do without you. You keep right on. We want your help to sell the goods," etc.

Several letters from William to the executor were put in evidence, in which William commended John's work and services, and cautioned him against overworking himself.

The executor was a skilled mechanic, and remained there in the factory, working for his mother and brothers and sisters, at less wages than he might have earned elsewhere, while his brothers went off to the city of New York, as they grew up, and entered into various occupations.

These same brothers and sisters now insist that the executor shall repay to the estate the wages which he retained for those eleven years' work. For six years after the testator's death, George, Julius, Laura, Julia and Henry were at the home-stead, and were supported partly by the proceeds from the factory.

The executor acted as manager of the business, as well as performing the work of a skilled mechanic.

The rule is well settled that an executor can receive no greater compensation for his own services than the commissions fixed by statute. *Matter of Hayden's Estate*, 7 N. Y. Supp. 313; *Matter of Taft Estate*, 8 N. Y. Supp. 282; *Collier v. Munn*, 41 N. Y. 144.

This case is, however, distinguishable from the cases cited, in several particulars. Here the will did not direct the execu-

tor to continue to carry on the business. He did it on his own responsibility, and at the request of some of the contestants.

The duties performed by him as a skilled mechanic were not in the line of his duty as executor, and were not imposed upon him by the will, nor by law. In all the cases cited by counsel for the contestants, the duties for which extra compensation was sought were executorial in their character. The services rendered by this executor were of such a character as an executor could not be required to render, and could not perform without the mechanical skill and training which this executor possessed.

The case most parallel is the case of *Lent v. Howard*, 89 N. Y. 169, in which it was held that an executor who managed a farm, in respect to which he owed no duty under the will, was entitled to receive out of the proceeds a reasonable compensation in addition to legal commissions.

There being no claim of waste or neglect by the executor in the management of this estate, or the conduct of the factory business, he is only chargeable with the net profit, as shown by Schedule B of the account.

The executor credits himself with the sum of \$8,715, paid to the widow as income, pursuant to the provisions of the will. This item is objected to, and it is claimed that the actual net income to which the widow was entitled amounted to but the sum of \$356.76, and that the above item should be disallowed, to the extent of \$8,358.30.

At the time of testator's death he owned considerable real estate, including a large brick factory, upon which there was a mortgage of \$10,500. By the account it appears that the executor is chargeable with personal estate aggregating the sum of \$30,089.72, including the profit earned by the executor in the factory. Substantially all this was used in the payment of the funeral expenses, expenses of the administration of the estate, and debts, including the mortgage for \$10,500. In fact, it appears that the executor and executrix mingled the personal

and real estate, using the personal estate for the benefit of the real, and using the rents of the real estate for the support of the widow and family, and payment of debts and expenses; it having been necessary so to do in order to keep the family together, support them and preserve the estate. There is no claim, and certainly no proof, that the executor acted other than in good faith, and for the best results. It is impossible, on this accounting, to entirely separate the personal and real. It is conceded, however, that substantially all of the personal estate, to wit, \$30,089.72, was used in the payment of debts and expenses.

The gross income of the real estate, down to June, 1891, the date of the widow's death, was the sum of \$14,284.21. The executor paid out of the rents, for insurance and taxes, the sum of \$7,863.51; leaving the sum of \$6,420.70, being the net income, if no other deductions are to be made.

It is contended, however, by the contestants, that the sum of \$5,764.14, paid by the executor for repairs, should be deducted from the income. I think not. These repairs were made for the permanent improvement of the real estate, and enhanced its value; and in the partition and sale of the real estate (the judgment in which action is in evidence) all the parties to this proceeding were benefited, to the extent to which these repairs enhanced the property. Under the circumstances, I think that these repairs should be charged against the principal, and not against the income. If the income had been forced to pay for all of the repairs and improvements to the real estate, there would have been no income for the widow. It was certainly the intention of the testator that the widow should have the income, and it was evidently his intention that there should be some income for her support and maintenance; and it having been paid to her, and used by her for her own support, and the support of the contestants while with her, it should not now, in justice or equity, be disallowed.

The above amount of \$6,420.70, plus the sum of \$37.26

(being the surplus of the personal estate after the payment of all the debts, etc.), making in all the sum of \$6,457.96, I find to be the total net income of the estate, out of which the executor paid \$300 to the testator's mother, pursuant to the will; and the balance of \$6,157.96, then, was income, to which the widow was entitled. This amount deducted from \$8,715.06 paid to her, leaves the sum of \$2,557.10, with which the executor should be charged, in addition to the amounts charged against him by his account, unless it is shown that these amounts have been paid to the contestants.

It is claimed on behalf of the executor that it appears that these contestants have received their respective shares of this difference. It appears that most of them lived with the mother several years; that all of them visited there frequently, and remained during the summer vacations, etc. But there is not sufficient proof to create legal liability upon their part. Morally and fairly, not one of them should seek to charge the executor with this difference; but they insist upon the objection, and I must find—reluctantly, however—that the executor is chargeable with this amount of \$2,557.10.

The next question to be considered is whether the executor should be charged with the sum of \$7,448.64, which is claimed to be the difference between the total receipts from the sale of real estate and the total amount paid to the children out of such receipts.

The will gave the executors power to sell. The executor sold certain premises, from 1880 to 1892, for the aggregate sum of \$23,448.64. Each of the children received various amounts out of these proceeds. The balance was used for the payment of taxes, insurance, etc., and the whole amount is accounted for by the account. It makes little difference where the money came from with which these items were paid. They had to be paid, and it matters little to the contestants from what source the money came, so long as none of the proceeds were used for improper use. If proceeds of the real estate were used to pay

debts, etc., these contestants received their respective shares of the personal estate, which otherwise would have been used for the same purpose.

The executor asks credit for the sum of \$1,285.77, paid for the erection of a frame factory. It seems that in 1881, not needing so much room, the executor rented the large factory for \$1,000 per year, and he moved the manufacturing business into a small new frame building, which he had erected at a cost of \$1,285.77.

It appears that it was necessary for the storing of the estate's property, and for the carrying on of the business, and that it enabled the executor to rent the large factory at a good rental. The new building, however, was started in January, 1881, for the purpose of providing a place for the sale of the goods of the estate. The executor testifies that it was necessary, and that no other place could be gotten, and when the large factory was rented for \$1,000 a year the executor moved his manufacturing business into it.

On the sale of the premises in the partition suit, this frame factory and the lot on which it stood sold for \$1,950, and it was shown that the lot was worth from \$300 to \$500; and each of these contestants received his share of the proceeds, with knowledge of the cause of increase of value. So that it is clear that the building of this factory was in every respect a benefit to the estate and these contestants, and the only question now is did the executor have the power to expend the estate moneys for that purpose?

The will imposed the duty of caring for and preserving the estate. It took several years to dispose of the peculiar stock and machinery of the business in which the testator was engaged, and the executor testified that it was necessary to have some place in which to store and sell these goods. Was it not within the power of the executor to provide a place with the assets of the estate for the care and preservation of estate property? However, the claim should be allowed for the reason

that the contestants have all reaped the benefit of these improvements, and received their respective shares of the increased price for which the property sold in the partition suit, and are now estopped from questioning the right or duty of the executor to erect the building.

In the case of *Rose v. Rose*, 6 Dem. 26, the executor, without authority, with assets of the estate, erected a house upon land of the estate, which afterwards was accepted by the beneficiaries, and sold at a loss, they receiving and retaining the proceeds, and it was held by the surrogate of Westchester county that their act amounted to a ratification of the investment, and discharged the executor from liability for the loss. Here the sale of the premises by these contestants, and the acceptance of the proceeds, which were increased by the act of the executor, constituted a ratification of his act in building, even if it was unauthorized.

As to the payments made to the children and the contestants, they are all allowed. They are all established by the testimony of the contestants themselves. Those who were under age at the time payments were made have testified that the amounts were received and have been retained, and thereby the payments have been ratified.

Objection is made to the payment of income to the widow on the ground that sufficient vouchers have not been produced. There is sufficient competent evidence to establish these payments; further, the widow is dead, and no claim is made on behalf of her estate. These contestants have no interest in that income as devisees of Julius E. Braunsdorf.

Let a decree be submitted upon two days' notice for settlement, at which time my attention may be called to any errors in respect to the testimony or the figures.

Costs to all parties out of the estate.

Ordered accordingly.

Nota.—The decision was modified by the Appellate Division in 2 App. Div. 73, as to the expense of repairs as between the life tenant and remainderman; it being therein held that the expense of necessary repairs to buildings, new fences and painting should be charged to income.

An executor is entitled to compensation in addition to his commissions where he renders valuable services to the estate in excess of his duties. (*Russell v. Hilton*, 37 Misc. Rep. 642.)

In the Matter of the Judicial Settlement of the Accounts of
JAMES SMITH, as Administrator of PETER SMITH,
Deceased.

(*Surrogate's Court, Westchester County, Filed July, 1895.*)

1. HUSBAND AND WIFE—SEPARATION.

A separation agreement is annulled by any subsequent cohabitation, in the absence of proof that it was intended to be anything else than a permanent resumption of the marital relation.

2. EXECUTORS—ACCOUNTING—BURDEN OF PROOF.

The burden of proving that debts paid by the administrator did not exist and were not paid in good faith rests on the contestant.

Judicial settlement of accounts.

Francis Larkin, for administrator; John Gibney, for contestant.

SILKMAN, S.—The principal question to be determined in this case is as to the validity of the agreement made between Mary Smith and Peter Smith on February 1, 1885.

The agreement recites: "Whereas, the parties are husband and wife, and that they cannot get along together in that rela-

tion, therefore they mutually agree to separate and live apart forever, and release each other from all marital rights."

The agreement then provides: "That the said party of the first part, for and in consideration of the sum of six hundred dollars to her in hand paid by the said party of the second part, her husband, the receipt whereof is hereby acknowledged, does hereby release and discharge the said party of the second part, her husband, from all claim she now has or she may hereafter have in any property he now owns or shall hereafter acquire in any way; also right of dower that she now has or may hereafter have in the real estate recently conveyed by the said Peter Smith to his five children, in which he reserved an estate for life; and for the consideration aforesaid the said party of the first part releases said party of the second part and his heirs and assigns from all support, maintenance, board, lodging, clothing, and everything else during her natural life; and said party of the first part covenants and agrees to and with the said party of the second part to maintain and support herself from this day as long as she lives, just the same as if she had never been married to the said party of the second part, and had always been a single woman."

Agreements for separation between husband and wife have never been favored by the courts, and it was early doubted whether they were not against public policy. *St. John v. St. John*, 11 Ves. 526. And it has been held that such agreements can only be supported where the separation has actually taken place. *Carson v. Murray*, 3 Paige, 483.

It was said by the chancellor in *Rogers v. Rogers*, 4 Paige, 516: "It is impossible for a feme covert to make any valid agreement with her husband to live separate from him, in violation of the marriage contract and of the duties which she owes to society, except under the sanction of the court, and in a case where the conduct of her husband has been such as to entitle her to a decree for a separation. The law of the land does not authorize or sanction a voluntary agreement between

husband and wife; it merely tolerates such agreements when made in such a manner that they can be enforced by or against a third person acting in behalf of the wife."

See, also, *Florentine v. Wilson*, Hill & D. 303; *Cropsey v. McKinney*, 30 Barb. 47; *Morgan v. Potter*, 17 Hun, 403; *Beach v. Beach*, 2 Hill, 260; *Van Order v. Van Order*, 8 Hun, 315; *Dupre v. Rein*, 7 Abb. N. C. 256; *Gilbert v. Gilbert*, 5 Misc. Rep. 555.

It is unnecessary to consider whether the disability which existed at common law which prevented a wife contracting with her husband has been abrogated by statute, for the reason that the agreement was executed prior to the passage of any such statute except the statute of 1849 (chapter 375), which has been expressly held not to apply to contracts between husband and wife. *White v. Wager*, 25 N. Y. 328.

It has been repeatedly held that any attempt of a wife to release her dower to her husband is void, and it has been held in England that a separation agreement which attempted to deprive a wife of all right, present and future, in a husband's personal estate, and all right of dower and thirds, was ineffectual for that purpose. *Slatter v. Slatter*, 1 Younge & C. Eq. 28.

The principle of this case seems to be sound, although it has been held in Pennsylvania that a similar deed cuts off a wife's dower and distributive share. *Dillinger's Appeal*, 35 Pa. St. 357.

Conceding the validity of the agreement, I am bound to find that it was subsequently rescinded and revoked by the cohabitation of the parties.

The evidence clearly shows that after the execution of this agreement they came together, and lived as man and wife. The rule of law is well settled that separation agreements are annulled by any subsequent cohabitation between husband and wife, even though such cohabitation be for ever so short a time, provided, when such cohabitation takes place, it was their inten-

tion to resume permanently the marital relation. *Carson v. Murray*, 3 Paige, 483.

There is nothing in the evidence to show that the subsequent cohabitation was intended to be anything else than a permanent resumption of the marital relation. It being clear that the marital relation was resumed, the presumption is that permanency was intended. The separation agreement was executed in view of the separation, and was dependent upon its continuance; and when the wife resumed her place as wife the cause which led to the contract ceased, and the consideration upon which it rested disappeared. *Zimmer v. Settle*, 124 N. Y. 37.

It must be assumed that when the parties rescinded the agreement of separation, and resumed their marital relations, all rights of one against the other, either in law or equity, were adjusted and settled. It follows, therefore, that Mary Smith, now O'Brien, widow of Peter Smith, is entitled to her distributive share of his estate to which she would be entitled if no agreement had ever been entered into.

The objections to the account taken by the widow to the payments on account of the cemetery plot do not seem to be well taken. They were debts incurred by the decedent in his lifetime, and no evidence has been offered sufficient to challenge the good faith of the administrator in their payment. The burden was on the contestant to show that the debts did not exist, and that they were not paid in good faith, and, the contestant having failed in this, the objections are overruled.

Decreed accordingly.

In the Matter of the Judicial Settlement of the Accounts of
SAMUEL W. HOAG et al., as Administrators of CANDACE
MALLORY, Deceased.

(Surrogate's Court, Cattaraugus County, Filed July, 1895.)

1. EXECUTORS—AGREEMENT AS TO PAYMENT FOR SERVICES.

An agreement by one who has been paying board, but feels unable to continue, that in return for care and maintenance the party furnishing it shall have whatever property such person may die possessed of, is valid and enforceable. 1

2. SAME—AMOUNT OF CLAIM.

Where claimant has furnished board under an agreement that he shall have whatever property the decedent left at her death, he is entitled to the entire residuum, without proof of the extent or value of such maintenance.

3. HUSBAND AND WIFE.

The right of a husband to recover for services rendered by his wife is not affected by the Married Woman's Act.

4. DECEDENT'S ESTATE—CLAIMS.

The rule that claims not presented during the decedent's life should be closely scrutinized does not apply to a case where, by the terms of the agreement, no right of action exists until the debtor's death.

Proceedings on judicial settlement and proof of personal claim.

George E. Spring and W. G. Laidlaw, for administrators;
J. H. Waring and W. W. Waring, for contestants.

DAVIE, S.—Candace Mallory died, intestate, December 15, 1893, leaving an estate of about \$500 after payments of debts and expenses of administration. On the 11th of January, 1894, letters of administration upon her estate were issued to Samuel W. Hoag and Mary L. Hoag, his wife, who was a sister of the deceased.

Deceased never married, and for many years prior to her death resided with the family of the administrators, a portion

of the time boarding with the family, occupying rooms in the house of Mr. Hoag, and at times boarding herself. She was a seamstress by trade, and occasionally was employed away from home. Her income was very limited, and her entire estate was personal, the most of which she derived upon the distribution of her father's estate. She had several brothers and sisters, but was not upon intimate terms with any of them except Mrs. Hoag.

The administrator, Samuel W. Hoag, presents a claim against the estate of deceased for her support and maintenance, the validity of which is controverted by the next of kin or their assignees.

It is urged on the part of the contestants that the relations existing between the deceased and the claimant were of such a character that such support and maintenance as he provided for her must be presumed to have been provided gratuitously; that the claim cannot be maintained without satisfactory proof of a positive agreement on the part of the deceased to make compensation, and that the claimant's case fails to meet this requirement.

Ordinarily, where one receives the beneficial services of another, the law implies a promise to pay what such services are reasonably worth, in the absence of an agreement for compensation; but it is undoubtedly true that such presumption may be entirely overcome by the circumstances of a particular case. The legal presumption of an obligation to pay is very weak where the services rendered are of such a character that, from the relations existing between the parties, they evidently were prompted by motives of affection and reciprocal obligations. If the circumstances are such as to lead to the conclusion that the services were rendered gratuitously, the law will not imply an obligation to pay. It has been distinctly held that, however valuable the services, one cannot render them with a tacit understanding that no pecuniary charge was to be made therefor and afterwards recover upon the *quantum meruit*. *Moore v. Moore*,

3 Abb. Ct. App. Dec. 303; *Williams v. Hutchinson*, 3 N. Y. 312; *Ross v. Ross*, 6 Hun, 182.

It is quite apparent that the claimant is not entitled to recover anything in consequence of any services or maintenance prior to the year 1882. Such claim is fully barred by the statute of limitations. Moreover, Mrs. Hoag testified, upon her cross-examination, that prior to that date they were maintaining the deceased without compensation. Although the deceased had on various occasions expressed a desire to compensate her sister and husband for what they had done for her, the first distinct negotiations relative to compensation took place in 1882. The evidence bearing upon this question comes from the claimant's wife. She was a competent witness, and not to any extent disqualified by the provisions of section 829 of the Code of Civil Procedure. *Porter v. Dunn*, 131 N. Y. 314.

This witness testified: "I said that we could not keep her as we had before. She said she was willing to pay, and I asked her how much. She said she was willing to pay a dollar a week besides what she did. I said that was all right; I was satisfied if she was. My husband was present when this conversation took place. Before that she had said, if she ever had anything, and could pay us for what we were doing for her, she wanted to pay us."

This arrangement continued during the years 1882 and 1883, the deceased in the meantime paying the stipulated price of one dollar per week.

In the year 1884 another conversation took place between the parties, concerning which Mrs. Hoag testified as follows: "She (deceased) said she didn't think she could pay as she had been paying the two years back; but if she had anything at her death she wanted we should have it. We said if we could have it, so we could get our pay if she had anything left at her death, it was all right, and we were satisfied. She could have the use of it while she lived. She wanted to stay. She thought she couldn't pay as she had been paying, but if she had any-

thing left at her death, and we were living, she wanted we should have it. Then Mr. Hoag said she could have the rooms, and stay with us when she wished, and, when she didn't, she could stay in her own rooms."

The evidence of Mrs. Hoag is corroborated to some extent by that of the witness McNall. He was a cousin of the deceased, and testified to having had a conversation with her in 1893, in which she said that "there was an arrangement between her, Sam and Mary. That the arrangement was that, if she died before Mary did, Mary was to have what was left of her property. She said that she had some money; that she had talked with them about giving her a home, and that she calculated that Mary should have whatever she left."

The contestants call attention with much earnestness to certain circumstances disclosed by the evidence, and to declarations alleged to have been made by the claimant, inconsistent to some extent with an understanding on his part that he was to be compensated for what he had done for the deceased. Yet the evidence of Mrs. Hoag is entirely uncontradicted. It is entitled to credit. We are not at liberty to disregard it. It establishes the fact, beyond question, that the conversation detailed by her actually took place in 1884. What, then, is its legal effect?

If the deceased, in declaring that Mrs. Hoag should have whatever estate she might possess at the time of her death, simply designed to express an intention of making a testamentary disposition of her property beneficial to Mrs. Hoag—a mere voluntary declaration, or even a recognition of a moral obligation—it is not sufficient to vest title to the residuum of the estate in either Mr. or Mrs. Hoag. An action cannot be predicated upon a contract that rests in intention solely. Even if Mr. and Mrs. Hoag were induced in consequence of these declarations to expect or to hope that the deceased would make a disposition of her property at her death favorable to them, it is not enough. *Collyer v. Collyer*, 113 N. Y. 449. The trans-

action must have a wider scope, and possess all the elements of a contract.

In view of the fact that for two years prior to the conversation of 1884 the deceased had been making a certain stated compensation for her maintenance, it can hardly be claimed that after that time it was the design or understanding of either party that such maintenance should be continued gratuitously. The only purpose of that conversation was to modify the terms of the agreement entered into in 1882. The deceased distinctly stated to Mr. and Mrs. Hoag that, if they would furnish her a home during the balance of her life, they should have as a compensation therefor whatever property might belong to the deceased at the date of her death. This offer was accepted by Mr. Hoag. He undertook, upon his part, to furnish such maintenance as the deceased might require. This makes a complete contract—an agreement to render services on the one part, and an agreement to make compensation on the other. Assume, for the sake of argument, that the estate of the deceased, at the date of the conversation in 1884, had consisted entirely of a mortgage for \$500, and she had said to Mr. Hoag that, if he would furnish her a home during her life, at her death he should have such mortgage; the validity of such an arrangement has been recognized and upheld. *Gescheidt v. Drier*, 44 N. Y. St. Rep. 481.

The terms of the agreement in the case at bar are equally as definite and certain as in the case cited. The parties evidently had a full appreciation of the scope and extent of the agreement. The deceased had resided with the claimant so long a time that he was fully appraised as to the probable expense of her future maintenance. He also understood the nature and extent of her estate, as well as the possibilities of its being increased or diminished. Under all the circumstances, it was entirely competent and proper for the parties to make an agreement of the character claimed to have been made; and, from a careful consideration of all the evidence in the case, I am of

the opinion that the parties designed and intended by the conversation in 1884 to enter into an agreement to the effect that Mr. and Mrs. Hoag should furnish the decedent a home during life, and, as compensation therefor, they should have whatever estate might belong to decedent at her death; that both parties thereafter acted upon the belief and understanding that a valid contract was existing between them to that effect. Mr. Hoag has fully performed this contract on his part, and he is entitled to recover thereon.

The right to recover in this case belongs to the husband, and not to the wife. The fact that the conversation regarding compensation took place between the deceased and the wife, and that the promise of the deceased was to the effect that Mary, or Mary and her husband, should have what property she left, does not change the situation. In the case of *Porter v. Dunn*, above cited, the arrangement for compensation was to the effect that the testator should make the wife of the plaintiff a legatee under his will to the extent of \$5,000, yet the court held that the right of action to recover for the wife's services belonged to the husband. Whatever services were rendered to the decedent by Mrs. Hoag were performed in the household of her husband. Such privileges and advantages as the deceased contracted for were to be received by her in the family of the claimant. Mrs. Hoag had no separate business or interests of her own, and the expense of the maintenance of the deceased was sustained by Mr. Hoag. It is entirely apparent that, whatever part Mrs. Hoag took in the negotiations for compensation, she was acting, not for herself, but for and subordinate to her husband. The legislation of this State relative to the rights of married women has only changed their common-law status to the extent set forth in the various statutes. They have not deprived the husband of his common-law right to avail himself of a profit or benefit from the services of the wife. *Reynolds v. Robinson*, 64 N. Y. 589; *Coleman v. Burr*, 93 id. 17; *Porter v. Dunn*, *supra*; *Stamp v. Franklin*, 144 N. Y. 607.

Having determined that the services in this case were rendered under an express agreement for compensation, it remains to be ascertained what the measure of such compensation is—whether the claimant is entitled to retain the entire residuum, without regard to the value of his services, or whether he must recover upon the *quantum meruit*. The principle is elementary that in these cases where the parties, by the terms of their contract, have fixed the measure of damages or agreed upon a method of determining the same, such agreement is controlling. In this case the parties have agreed that the measure of compensation should be the estate left by deceased. The evidence showing, as it does, that the claimant continued to maintain the deceased to the extent desired by her during her life, I am of the opinion that he is entitled to retain the entire residuum, without proof of the extent or value of such maintenance. In the case of *Porter v. Dunn*, *supra*, the testator having failed to provide the wife with the \$5,000 legacy, an action was brought against the executor to recover the value of the wife's services, and a judgment was obtained therein to the amount of \$7,599.52. On appeal the general term directed a modification of the judgment by reducing the recovery to \$5,000, upon the theory that the parties, by their agreement, had fixed that sum as the measure of compensation; but on appeal to the Court of Appeals the order and judgment of the general term were reversed, and the original judgment entered upon the report of the referee affirmed, the court saying: "The difficulty in the way of sustaining the modification by the general term upon the facts is in the very absence of facts to support the theory expressed in their opinion of an agreement or obligation limiting a recovery." See page 319. The distinction between the cases cited and the one at bar is that in the former the parties, by their agreement, had failed to establish a measure of damages, for, as the court says, "neither party seems to have considered that there was anything which amounted to an agreement limiting the amount of compensation" (page

318); but in this case the parties have distinctly fixed the amount of compensation, not, it is true, in dollars and cents, not a certain amount by the week or month, but the property which the deceased might possess at the time of her death.

But, if it is insisted that the claimant can recover only upon the *quantum meruit*, then, even, the claim is satisfactorily established by the evidence. Mrs. Hoag testified with a considerable degree of particularity in regard to the portion of time that deceased took her meals with the family, and as to the necessities furnished to her at such times as she boarded herself. She says that during the time intervening between the conversation of 1884 and the death of the deceased she would take her meals with the family for six weeks at a time, and at other times three or four days, and would then furnish her own meals for a time. Mrs. Hoag testified that she had been a married woman twenty-eight years, and had kept house and had the management of the household matters; that she knew the value of board, and that the accommodations furnished to the deceased were worth \$1 per week. Other witnesses, who were inmates of the claimant's household for considerable periods of time prior to the death of deceased, and who knew the nature of the privileges accorded to the deceased, testified that her board was worth \$2.50 per week. Mrs. Hoag's estimate covers the entire period, whether the deceased was taking her meals with the family or boarding herself; that is, \$1 a week on the average for the entire time. The estimate of the other witnesses at \$2.50 was for steady board by the week, from the conversation in 1884 to the beginning of the final illness of the deceased—503 weeks. Her last sickness continued three weeks. Mr. Hoag and wife nursed and cared for her during that time, and their services in so doing was worth \$2 per day, making the aggregate of the claim for the entire time \$545—a sum greater than the residuum of the estate.

It is undoubtedly true that claims withheld during the life of the alleged debtor, and sought to be enforced against his

estate, should be carefully scrutinized, and allowed only upon clear and satisfactory proof. *Kearney v. McKeon*, 85 N. Y. 139. But this principle, from its very nature, can have no application to a case where, by the terms of the agreement between the parties, no right of action exists until the death of the debtor. Mr. Hoag was not in a situation to demand compensation from the deceased during her life time. That was not the agreement or understanding between them. I am convinced that the claimant's right to retain the entire residue of this estate is fully established by the evidence, and, accordingly, the decree entered will direct the administrators, after the payment of commissions and the expenses of the accounting, to pay whatever balance may remain to the claimant, Samuel W. Hoag, in satisfaction of his claim against the estate of the deceased.

Ordered accordingly.

In the Matter of the Estate of CHARITY H. BEVIER, Deceased.

(Surrogate's Court, Ulster County, Filed July, 1895.)

1. TRUSTEES—COMMISSIONS.

Where, prior to his removal, a trustee has paid over the entire income to the beneficiary without deducting his commissions and has turned over the securities to his successor, the surrogate has no jurisdiction to direct his successor to pay him the commissions.

2. EXECUTORS—ACCOUNTING—COSTS.

The costs of an accounting by an executor who has resigned or been removed must be borne by him, and cannot be charged against the estate.

Settlement of accounts.

Lounsbery & Jenkins, for James E. Ostrander, a former executor, who was removed by the surrogate; Kenyon & Sharp,

for Charles W. Deyo, trustee appointed by the surrogate, and for Ann E. Hoornbeck, a life beneficiary; John G. Van Etten, for Louise Schoonmaker, executrix of, etc., of Augustus Schoonmaker, deceased executor named in the will; John F. Cloonan, special guardian for Charity B. Hoornbeck, an infant remainderman.

BETTS, S.—Charity H. Bevier died in this county March 21, 1878, leaving a last will and testament in and by which she appointed Augustus Schoonmaker, Jr., and James Ostrander the executors thereof, which will was duly probated and the executors entered upon the discharge of their trust.

The will contains among other provisions the following: "Third. I give and bequeath to my executors hereafter named and to the survivor of them the sum of three thousand dollars, in trust, to hold, manage and invest the same and to pay over the interest thereof, semi-annually, to my niece, Ann Elizabeth Hoornbeck, during her natural life, and after her decease I give and bequeath the one-half of said sum to the children of my nephew, Abram A. Hoornbeck, and the other half to George Hoornbeck and Jane Hoornbeck, the children of my nephew, Cornelius H. Hoornbeck, deceased. But in case the said Ann Elizabeth shall become free and discharged from debts and liabilities at any time during her life, either before or after my decease, then it is my will and desire, and I so direct, that the said sum given in trust to my executors as above mentioned be paid over to her and belong to her, and be subject to her control and disposal."

The will also contained a residuary clause dividing the estate not specifically bequeathed into six parts and bequeathing "one-sixth thereof the same in all respects as specified in the third clause of this will in regard to the sum named in that clause."

A decree was entered in this court on the 9th day of March, 1880, settling the accounts of the executors under said will and directing them to hold in their hands of the balance of the estate as follows: "One-sixth thereof, being the sum of \$929.90, to

be held by said executors under the provisions of said will in trust for Ann Elizabeth Hoornbeck as directed by such will, and it is further ordered that the said executors continue to hold in trust for Ann Elizabeth Hoornbeck under the provisions of said will the bond and mortgage now held by them for that purpose for the sum of \$3,000."

On October 11, 1894, a petition was filed in this court by Ann Elizabeth Hoornbeck, the life beneficiary under said will, reciting that Augustus Schoonmaker, Jr., was dead, leaving a last will and testament in which Louise Schoonmaker, his wife, was named as sole executrix. That said will has been proved and Louise Schoonmaker had entered upon the discharge of her duties as executrix, and that she had in her possession and custody the trust moneys and securities belonging to said estate of which Ann Elizabeth Hoornbeck was entitled to the income thereof. The petition also recited that James E. Ostrander, one of the executors of the will of Charity H. Bevier, was on November 30, 1892, at a court of oyer and terminer held in and for the county of Ulster, convicted of an infamous offense, and sentenced by said court to be confined at hard labor in State prison at Dannemora for the term of seven years, and asked for a decree revoking letters testamentary issued to said James E. Ostrander, and that he be removed both as executor and as trustee under the said will, and that some competent person be appointed in his place. Citations were duly issued upon that petition directed to all the persons interested and such proceedings were had that on the 12th day of November, 1894, a decree was entered in this court removing said James E. Ostrander as executor and trustee for the reasons cited in the petition and decree, and appointing Charles W. Deyo, of this city, trustee under the said will in his place.

It appeared upon this hearing that shortly after the financial troubles of the Ulster County Savings Institution which led to the arrest and conviction of Ostrander the funds and securities remaining in his hands as trustee under said will were turned

over to Augustus Schoonmaker, his co-executor and trustee thereunder, so the decree appointing Charles W. Deyo provided that upon his filing a bond as therein directed "the said Louise Schoonmaker, as executrix of the last will and testament of Augustus Schoonmaker, deceased, is hereby directed to deliver over to the said Charles W. Deyo the said trust funds and securities."

On March 20, 1895, a petition was filed in this court by James E. Ostrander, the removed executor and trustee, asking that his accounts might be judicially settled and that he might be paid the sum of \$349.91 by the new trustee, Charles W. Deyo, for his commissions for acting as executor and trustee subsequent to the final accounting had in 1880, and up to the time of his removal. Upon this petition citations were issued bringing in all the interested parties. Objections were filed to the account and against any commissions being allowed to Ostrander or any costs of the proceeding by the special guardian, and also by Charles W. Deyo, trustee, and Ann E. Hoornbeck, the life beneficiary. The attorney for Louise Schoonmaker, executrix of Augustus Schoonmaker, appearing in the proceeding, and while not insisting that commissions be allowed her, did ask that the accounts of Augustus Schoonmaker as such executor and trustee be judicially settled and that costs of this proceeding be allowed the said executrix.

The various questions presented were warmly contested on the trial and elaborate briefs presented by all parties.

It appearing upon the hearing that the executors had had their commissions upon the final accounting in 1880 upon the \$3,000 secured by bond and mortgage, and also upon the principal sum on deposit in the Ulster County Savings Institution, it was stipulated by Ostrander's attorneys that no claim should be made here for such commissions. Such corrections were made in the account upon the hearing that it is now claimed on behalf of Ostrander that he is entitled to commissions only upon the sum of \$2,438.94 of income from said estate instead of upon

the sum of \$7,348.15, as claimed in the petition; and this court is asked to make an order or decree directing the present trustee to pay the commissions upon that sum to him.

The Surrogate's Court is one of limited jurisdiction. It can only exercise such jurisdiction as has been specially conferred by statute, together with such incidental powers as may be requisite to effectually carry out the jurisdiction actually granted. *Riggs v. Cragg*, 89 N. Y. 489, and cases there cited.

No funds remain in the hands of Ostrander, or were in his hands at the time he was removed from office, by which he could retain the amount of his commission, if any commissions were due him. He voluntarily paid to the life beneficiary under the will the entire income from the estate, making no deductions whatever for his commissions.

Charles W. Deyo,, by the decree of this court, was appointed trustee under said will of Charity H. Bevier, and must carry out the provisions of the will as to payment of income, which is to pay the same to said Ann Elizabeth Hoornbeck. Any contrary direction to him now as to the disposition of the income would be in opposition to the provisions of the will and also to the decree of this court, which has not been opened, vacated or altered. Commissions cannot now be allowed Ostrander, payable out of the principal of the estate, for the reason that if he is entitled to any commissions at all it is from the income, and neither the Surrogate's Court nor any other court would have authority to pay these commissions from funds belonging to the remainderman.

It was held in the Matter of Underhill, 117 N. Y. 471, by the Court of Appeals, Judge PECKHAM writing the opinion, that where a surrogate's decree showed that an executor had overpaid a legatee there was no jurisdiction in Surrogate's Court to direct the re-payment by said legatee to the executor of the sum so overpaid or to direct the entry of any judgment against said overpaid legatees in favor of the executor.

It was also held by the Court of Appeals in the *Matter of Lang*, 144 N. Y. 275, decided this year, Chief Justice ANDREWS writing the opinion, that where one executor had overpaid another executor as a legatee the sum of \$1,756.25, \$93.75 of which were commissions, and it appearing that there were no assets remaining in the hands of the accounting executor by which he could obtain his commissions, that the Surrogate's Court has no jurisdiction to direct the repayment of that sum by the legatee to the executor who instituted the proceedings. It was said in this case, as in the case of *Underhill*, that if it was desired that the surrogate should have a broader jurisdiction it must be conferred by the Legislature.

Those decisions would seem to be decisive of the question submitted to me as to the authority and jurisdiction of this court to direct any commissions whatever to be paid to James E. Ostrander by Charles W. Deyo, the present trustee. I can see no difference in principle in the application made here from that which might be made by any executor against an overpaid legatee for the recovery of said overpaid legacy, which a long line of decisions holds that the surrogate has no jurisdiction to compel the repayment of. If any right to the payment of commissions upon the income exists, it must be asserted in another forum with jurisdiction broad enough to enforce its decrees.

It appears from the evidence that from the time that Ostrander turned over the securities to the late Judge Schoonmaker that Schoonmaker retained his commissions, and no claim is made now by his executor for any commissions due him.

As to the matter of costs of the proceeding.

It was held in an early case in the *Matter of Jones*, 4 Sandf. Ch. 615, by the vice-chancellor, decided in June, 1847, that where a trustee resigned from his duties previous to the completion of his trust, that the resigning trustee must pay the costs of the petition and of the appointment of his successor, and be allowed no commissions on the capital of the trust property. And this decision has been followed ever since.

It is urged strongly on the part of the *cestui que trust* that Ostrander has already caused the estate considerable expense; that he did not resign and proceedings were necessary to remove him, the cost of which proceedings was paid by the beneficiaries; that if it is desirable that his account should be settled and adjusted, that it should be done at his own expense.

In a case decided in the General Term of the Supreme Court in 1892, 50 N. Y. St. Repr. 629, in the Matter of the Accounts of Richard Dixon *et al.*, Executors, it was held, the executors asking to be discharged, that "it was no more than just that they should not charge the estate with a special accounting. The executors had good reason to be discharged on their own request without fulfilling the trust, but it was equitable that their application should not cost the funds for an account which was only an incident to their discharge on their own request."

If an executor or trustee who simply asked to be relieved from the trust cannot be so relieved without paying the costs of the accounting, this would seem to be a much stronger case for no costs being allowed from the estate where the executor is removed by reason of his having voluntarily placed himself in such a position that he could not fulfil the duties of the trust committed to him. It makes little difference in this proceeding that no mismanagement of these funds was shown upon Ostrander's part. He is unable to complete the trust. The newly-appointed trustee will eventually have to have a judicial settlement of his accounts, the costs of which will properly be borne by the estate. It should not be subjected to double and unnecessary costs.

A decree may be handed up settling the accounts of the late executors and trustees in accordance with the evidence submitted, and providing that no commissions can be allowed by this court in this proceeding to James E. Ostrander and denying the application on the part of his attorney and the attorney of Louise Schoonmaker for costs from the estate, and allowing the special guardian the sum of \$50 for his costs, and the sten-

ographer the sum of \$15, payable from funds on deposit in the Ulster County Savings Institution.

Decreed accordingly.

In the Matter of the Estate of LYDIA C. RAY, Deceased.

(Surrogate's Court, Madison County, Filed July, 1895.)

TRANSFER TAX—EXEMPTION.

The words "husband of a daughter" in section 2 of the Transfer Tax Law of 1892 include the husband of a deceased daughter, even though he has remarried.

Proceedings under the Transfer Tax Act.

M. E. Barlow, for George H. Munger.

KENNEDY, S. — Lydia C. Ray died at Canastota, in this county, May 12, 1893, leaving, her surviving, neither husband nor descendants. She left personal property, the value of which, after deducting the payment of debts and funeral expenses, amounted to the sum of \$9,353, and real estate of the value of \$450. She left a will dated March 24, 1885, bequeathing and devising the use of all her property to her son-in-law, George H. Munger, with the right to appropriate so much of the principal as circumstances might require for his comfort, convenience and support; the remainder, at his death, to go to Colgate University. Munger married the only child of the testatrix in 1863. This daughter died April 12, 1879, leaving no children. From the death of Mrs. Ray's husband, in 1873, until her death, in 1893, she and said Munger have lived together, caring for each other as mother and son.

It is claimed on the part of the State that the legacy to Mr.

Munger is liable to a transfer tax, for the reason that, said Munger's wife having died prior to the death of the said testatrix, he is not the "husband of a daughter." We do not think that a proper construction of the statute will justify this conclusion. The language of the act in relation to taxable transfers of property, so far as it applies to this proceeding, is as follows:

"When the property or any beneficial interest therein passes by any such transfer to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of a son, or the husband of a daughter, . . . such transfer of property shall not be taxable under this act, unless it is personal property of the value of ten thousand dollars or more."

If it be conceded that, in a technical sense, a man whose wife is dead is not a husband, still, in a sentimental and social sense, by common usage as well as by statute, such a person, upon the settlement of estates especially, and in some other matters generally, is recognized and designated as "husband" instead of "widower," which perhaps more accurately describes his relation to his dead wife; but, if the wife survives the husband, she is described sometimes as "wife" and sometimes as "widow." Thus, letters of administration in cases of intestacy must be granted, in certain cases, to the surviving "husband" or "wife," although previous to 1893, if the wife survived the husband, letters were to be issued to the "widow," but never to a "widower." The Code of Civil Procedure provides that if a man having a family die, leaving a "widow" or minor child or children, certain enumerated articles are to be set aside for them, and if a married woman die, leaving surviving her a "husband" or minor child or children, the same class of articles and amount of property are to be set apart for them, with the same effect and for their benefit. Without exception, the statutes of this State, the opinions of its courts, and all text-books discussing the legal rights of the husband where the wife is dead invariably describe and designate him as a "husband,"

the word "widower" never being used for that purpose. The word "husband" or "surviving husband" has become so imbedded in our statutes and in all legal phraseology that it has the same force and meaning and the same legal effect as if he had been described as "widower." If the legislature had intended not to use the word "husband" in the same sense as it has always been used by the laws of this State and by its courts, it would have made its meaning clear, definite, certain, by saying the "husband of a daughter, if she be living." By omitting to restrict this exemption to a husband whose wife was living, it seems very clear that the word "husband" is here used in its general and accepted sense, which not only common usage but the statutes of this State make use of, and as the word is ordinarily used and understood in speaking of a surviving "husband."

But it is urged that, the Transfer Act having made use of the words "wife" or "widow" of a son, and omitted to say "husband" or "widower" of a daughter, there is valid ground to claim that it was not intended that the husband of a daughter should be exempt unless the daughter was living, upon the theory that a "husband" is a man who has a wife, but that in case his wife is dead he is not a "husband," and not, therefore, within the exemptions of the law. Perhaps there might be some force in the suggestion were it not for the fact that in all our statutes sometimes the word "wife" and sometimes the word "widow" is used, referring to a woman whose husband has died, both words meaning in the settlement of estates the same person, who is entitled to the same legal rights; while, upon the other hand, the word "widower" is never used to designate a man whose wife has died, but always the word "husband." So that, when the act says "wife" or "widow" of a son, we think it clear that it was intended that the husband of a daughter, though she be dead, is entitled to the same exemptions as if his wife were living.

No satisfactory reason can be urged why the "widow of a

son" should be exempt, and the "husband of a dead daughter" not exempt. Both sustain the same relative relation to the decedent. Both should be equally entitled to be exempted from the operation of the law. Neither justice nor necessity gives to the widow of a son any superior claim to be exempted from this taxation, and both should stand upon the same footing. If the word "widower" had ever been used in the statutes to describe a man whose wife were dead, there might be some grounds to draw the distinction claimed by the State in this proceeding. The absence of the word "widower" does not suggest that the word "husband" was used in any limited or restricted sense, but, upon the other hand, it is to be given its ordinary legal significance, which custom and long usage and the law and the courts have given it.

For all legal purposes, the man whose wife is dead continues to be her husband, and such he is declared to be by law, and as "husband" he is entitled to certain rights in her property. A misdescription in the name of a person or corporation to whom a devise or bequest is made is of no avail, provided the devisee is clearly and distinctly known. But, if the claim of the State in this proceeding is correct, certain rights conferred upon the "husband" or any legacies to him as "husband" could not be enforced because he is not correctly described as "widower." Wills take effect upon the death of the testator, but, upon the construction claimed in this case, all legacies given to a "wife" must lapse and be void, unless given to a "widow," because there would be no "wife" in existence to take the property.

For centuries the word "husband," and not the word "widower," has been used in law to describe a person whose wife was dead; and from this long usage we think it clear that the originators and draftsmen of the Transfer Act used the word with the same force, effect and meaning that it had theretofore had, and did not intend to use it in a technical and restricted sense, but designed to place the husband of a daughter on the same footing and equality as the wife or widow of a son. Had

the word "wife" alone been used, it might have been strongly argued that the legislature intended to limit the exemption to children by marriage whose wives or husbands were living at the death of the testator or intestate; but, having removed all uncertainty in this respect by saying that the "wife or widow" of a son shall be exempt, we think it equally clear from the manner in which the word "husband" has been used and construed in the statutes, that it is not intended to treat them differently and to exclude the husband of a deceased daughter from the benefits of the act, for the same description and phraseology are used in designating the rights of the husband in the Transfer Act as in the other statutes of the State.

Thus far we had written when first appraised that said Munger had remarried during the lifetime of the testatrix, and was living with his wife at the time of Mrs. Ray's death. As we have construed the word "husband" to mean the same as if the statute had said "husband" or "widower" of a daughter, we are confronted with the definitions of the word "widow" as stated in the various dictionaries, to wit: "An unmarried woman whose husband is dead;" "one who has lost her husband by death, and who has not taken another;" "whose husband is dead, and who remains unmarried,"—and by the argument, based on these definitions, that in order to be a widow she must remain unmarried. The question at issue is not whether these definitions are correct, but what is the legal import, meaning, effect and object of the words "wife or widow of a son," or "husband of a daughter," as these words are used in this and other statutes of this State, or, if the language made use of to express the intention of those who prepared and passed the law is not clear, what construction will best accomplish the design? The fact that the statute itself has not made remarriage during the lifetime of the ancestor a bar to exemption from the tax is some evidence that it was not so intended to operate, for in many cases such persons would have a family to support which

would be benefited by the exemption, and this fact may have been one of the reasons that influenced the legislature to adopt this provision. Again, a legacy would not ordinarily be given to the "widow" of a son, or to the "husband" of a deceased daughter, were it not for the fact that the relation of son-in-law or daughter-in-law continued or was supposed to exist by legal fiction, if not in fact.

A woman, though the wife of another, is still the widow of her former husband; though married to another woman, the husband is still the widower of his former wife; and, this being so, both come not only within the language of the law, but within its just and reasonable construction. The law invests them with the name of "husband" or "wife" or "widow," for certain legal purposes, and under these names, although the designation may not come within the definition of the dictionary, property may vest in them, whether it come to them by legacy or otherwise. Notwithstanding the definitions of the words "wife," "widow" and "husband," we apprehend it is not our duty to accept them in place of the statutes of this State, which make use of these words, whether correctly or not, to designate persons entitled to certain legal rights. The words "wife," "widow" and "husband" have obtained a legal use and significance in the settlement of estates which may not correspond to the technical definition of the lexicographers, but it is the duty of courts to give that effect to these words which long use and custom have sanctioned. Until the legislature has removed all doubt by plainly saying that the "husband of a daughter, if she be living," or the "widow of a son, if she be unmarried," are exempted from the tax, courts are justified in giving the interpretation to the Transfer Act which will make effective the objects of the law, and confer upon heirs and legatees the benefit which the legislature intended.

An order will therefore be entered exempting the beneficial interest of said Munger from taxation.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Accounts of
JOHN N. WOODBURY, as Executor and Trustee of the
Estate of JENNETTE BEEBE, Deceased.

(Surrogate's Court, Madison County, Filed July, 1895.)

1. EXECUTORS—SALE.

An executor has no right to sell personal property on credit except for payment of debts and legacies, and if he does so, will be held personally liable for all losses and expenses which occur by reason thereof.

2. SAME.

The approved security required in such a case must consist of national or State bonds or real estate mortgages, and must be approved by the surrogate.

Judicial settlement of an executor's accounts.

H. B. Coman, for executor; M. H. Kiley and John E. Smith, for legatee.

KENNEDY, S.—Jennette Beebe died in the town of Smithfield, in this county, in 1873, leaving a farm of 160 acres and personal estate amounting to about \$5,000. She left a will by which her husband and two young children were to have their support from her property until the children became twenty-one years of age, at which time it was to be disposed of according to the terms of the will. In the year 1876 the executor sold at auction the stock and farming utensils upon the farm. At the sale, property of the value of \$391 was sold upon credit, a note being given by the purchasers thereof, due in nine months thereafter, with an indorser thereon. A short time after the sale the makers of the note went into bankruptcy, and the indorser became irresponsible, so that when the note matured it was uncollectible. Before the executor took the note, he made inquiry of various persons as to the financial responsibility of the makers and indorser, examined the records of the county

clerk's office, and satisfied himself that the note was good, and such as business men would ordinarily accept in commercial dealings. Upon this accounting, the residuary legatee seeks to hold the executor responsible for the amount of the note, with interest from the time it was given, upon the ground that he had no right to sell the property on credit. The executor claims that he should not be held liable for the loss, because he acted in good faith and with reasonable care and diligence. He also claims exemption from liability for the reason that the note, with an indorser thereon, was an "approved security," within section 2717 of the Code, which is as follows (in part): "If an executor or administrator discover that the debts against any deceased person, and the legacies bequeathed by him, cannot be paid and satisfied without a sale of the personal property of the deceased, the same, so far as may be necessary for the payment of such debts and legacies, must be sold. The sale may be public or private, and, except in the city of New York, may be on credit not exceeding one year, with approved security. The executor or administrator is not responsible for any loss happening on the sale when made in good faith and with ordinary prudence," etc.

We must hold that neither the executor's good faith and diligence nor the statute exempt him from liability for the loss. It will be observed that the executor has no right to sell upon credit, except for the payment of the debts and legacies of the deceased. As the testatrix left nearly \$5,000 of personal property, while her debts amounted to only a few hundred dollars, it was unnecessary to sell it for the payment of her debts. As the legacies payable at the end of a year from the death of Mrs. Beebe amounted only to the sum of \$1,042.88, while the legacy to her daughter was not payable until she became twenty-one (many years after the action), it was unnecessary to sell on credit for the payment of any legacy. The sale, therefore, upon the executor's theory of law, was not justifiable; but, if it be assumed that it was necessary to sell the property for the payment of

debts and legacies, the construction which we shall give to section 2717 of the Code renders him liable for the loss, because the note was not such an approved security as the law contemplates. In commercial dealings between private individuals and corporations, notes, bonds, stocks and other forms of contract may be taken for or as security for debts and other purposes, and may be recognized between the parties and by courts under the name of "securities;" but in legal proceedings the law requires security of a different character, and over which the courts have control,—a security which makes the debt assured; something which makes its payment certain, which makes sure the performance of a contract, and prevents loss from insolvency or otherwise. This note, as between the makers and the executor, was not and could not be taken as a security, for the reason that it only changed the form of the debt from a book account to a promissory note. It added nothing whatever to the security or the safety of the debt; so that the only security that there could possibly be was the indorsement of one equally as irresponsible and worthless as the makers of the note.

The settlement of estates is a special proceeding, under the supervision and control of the courts; and though the Code says that an executor or administrator may sell on credit for certain purposes with approved security, we shall hold that in such cases approved security means national and State bonds and mortgages on real estate, because it is an investment for the time being of the assets of the estate, and courts have held rigidly to the rule that if trustees, without express authority in some legal form, invest in notes, stocks or bonds, they will be held responsible for all losses occasioned by such investments. The courts, in so deciding, have imposed no harsh nor unreasonable rule upon them in the discharge of their duties, but have given them a safe, simple and reasonable rule of conduct, easily complied with, and in obeying which they assume no risk, and the estate they represent can sustain no loss. We have said this note was not such a legal security as the executor was author-

ized to take, because it was not such a one as the courts recognize and approve in the care and management of estates by trustees. We go further, and say that if the executor had a right to sell upon credit and take the notes of purchasers, he would still be liable for the loss, because the security was not approved by the surrogate before it was accepted by him. The statute says that executors and administrators may sell upon credit with "approved security." Approved by whom?

As the law is silent on this point, we assume, in analogy to the law and practice in civil actions and other special proceedings, that the security is to be approved by some court having jurisdiction of the matter. It is one of the duties of surrogates to direct and control the conduct of executors and administrators in the settlement of estates; but the construction of the Code sought to be maintained in this proceeding would enable them to exchange valuable assets of an estate for such alleged securities as in the end might prove worthless, or afford no adequate protection to an estate, and would exclude the surrogate from having any control or jurisdiction over one of the necessary, indispensable and most important acts of an executor or administrator. If this right exists, the estate of the dead is placed in a most perilous, hazardous and unprotected condition, because its assets would be placed beyond the control of the courts, and often in the hands of those who, however honest they may be, are personally irresponsible and unable to make good any loss which their acts may have brought on the estate. No greater opportunity for fraud and dishonesty could be devised than this statute as construed by the executor, no greater opportunity for carelessness and negligence, or for those acts, done in good faith perhaps, yet which are often so ruinous and disastrous to estates; it would simply be a legal shield for lack of judgment, vigilance, discretion, for all those acts by which heirs and legatees could be cheated, wronged and deprived of that which rightfully belonged to them. If, however, it be asserted that the law is so drawn that there are doubts as to whether approved

security means such only as is approved by the surrogate and the courts of this State, instead of the executor, we think it the duty of courts to give the benefit of such doubts, if there are any, to the estate, and construe it in such manner as shall be harmless to an executor or an administrator, and at the same time protect the estate from all possibility of loss from their acts in the sale of property upon credit for the payment of debts and legacies.

But it is claimed that the word "security" does not necessarily mean State or national bonds, or mortgages on real estate, for the reason that the word "security," whenever used in the Code, means a bond or undertaking with one or more sureties, and that hence there is no positive rule or statute as to what will constitute a security in legal proceedings, so that a note or bond may be regarded as an approved security. We do not think such an inference is justified, but, on the contrary, hold that the law and practice of the courts in regard to bonds in actions and special proceedings suggest the conclusions that we have stated, for the reason that bonds thus taken must in all cases be approved by the court or a judge thereof. In such cases the parties interested are afforded ample protection, since they may cause a bondsman to be examined as to the character and amount of his property, his indebtedness, and as to such other facts as will enable them to determine whether the security is ample and satisfactory, and if found insufficient, other bondsmen must be obtained, and besides this, if at any time the bond for any cause becomes inadequate, another one may be required to be given and approved by the courts; so that at all times during the pendency of an action a party entitled to a bond has ample protection from loss, while under the statute in question a bond would be no better than a note, both equally good or equally valueless, because neither the executor nor the parties interested would have the power to compel a new bond to be given if its makers became insolvent or of doubtful responsibility. The fact that heirs and legatees would be powerless to protect themselves against the acts of an executor in taking bonds and notes and other pretended securities when he sells upon

credit justifies the conclusions that approved securities, when taken by him on a credit sale, mean such only as are approved by the courts and by surrogates, and not by the executor. For the reason stated, we must hold the executor liable for the \$391, and also for a similar note of \$30 which he has been unable to collect.

The executor has charged this estate for the expense he incurred in attempting to collect said notes. These items we disallow, because it was through his own negligence in taking the notes that the costs were made. When he accepted the notes, he took upon himself the hazard of their non-payment, and he has no right to subject this estate to the payment of expenses incurred through his own fault and neglect of duty. The surrogate of this county has had but one inflexible rule in regard to the sale of the assets of an estate by executors and administrators, to wit, that they must be sold for cash, and that, if sold on credit, executors and administrators will be held personally liable for all losses and expenses that may occur by reason of such sale; and we must decline to make this case an exception from this safe rule of conduct in the settlement of estates.

We are asked to hold the executor liable for interest on the notes in question from their date to the present time. This we should do were it not for the fact that an adjustment of his accounts shows that he has advanced to the estate \$332.95 more than he has received; his commissions, amounting only to the sum of \$152.12, are unpaid,—making in all \$485.07, which cannot be collected from the estate. Moreover, his executorship and trusteeship have been running for twenty-one years, requiring much time, care and responsibility, for which he only gets his commissions, being only about seven dollars a year for his services,—a very inadequate, but still his only legal, compensation. Under such circumstances, it would be unjust to charge him with interest.

The respective counsel will readjust the accounts in accordance with the above conclusions.

Ordered accordingly.

**In the Matter of the Probate of the Will of LUCY H. EAKINS,
Deceased.**

(Surrogate's Court, Ulster County, Filed July, 1895.)

WILL—EXECUTION.

Exhibition to the witnesses of a piece of apparently blank paper, with the remark that "this is my will," or "I have made my will; I want you to sign it," is not an acknowledgment of a subscription within the meaning of the statute.

Probate of will.

Benjamin M. Coon (Peter Cantine, of counsel), for proponent; Jas. A. Ryan, for contestant.

BETTS, S.—Lucy H. Eakins died at Glasco, in this county, on November 17, 1893, leaving, her surviving, Sarah J. Maginnis, a daughter, and John S. Eakins and George H. Galvin, sons, all of full age. She was possessed of certain real estate, estimated to be worth about \$5,000, and personal property, about \$200. On January 21, 1895,—over one year and two months after her death,—application is made by petition in this court for the probate of a paper writing alleged to be the last will and testament of deceased, bearing date August 15, 1890, by Sarah J. Maginnis, one of the executrices named therein. The son, George H. Galvin, files verified objections to the probate of the will, the principal one insisted on at the trial being that the paper was not executed in accordance with the statute. The following is a copy of the paper offered for probate:

" Mattie Holsten.

" Catharine McFetridge X.

BROOKLYN, August 15, 1890.

" I will and bequeath to my daughter Sarah J. Maginnis my House and Lot known as a 107 Driggs St. and all my House-

hold effects my clothes and everything belonging to me in Any way and appoint her and Mrs. Sarah J. Quinn of 124 South first St., Brooklyn executriss of this my last will and testament.

LUCY H. EAKINS."

There was no attestation clause.

This paper writing is very peculiar. It bears the appearance of having been written by deceased, or some one entirely unfamiliar with drawing wills, and is apparently all in the same handwriting, including the signature. The writing (exclusive of the signatures of Holsten and McFetridge) occupies about three-fourths of what is apparently the second page, or inside page, of a small sheet of note paper folded in two leaves. About one-third of the second leaf, or third and fourth pages, of this sheet, has been torn off, and the remainder of said third and fourth pages is entirely blank. On what I should consider the first page of this document is written "Mattie Holsten" and "Catharine McFetridge X." So that the first that is met with, in an examination of this remarkable document, is what is claimed to be the signatures of the witnesses. The signatures of the alleged witnesses precede the alleged will, and are on the reverse side of the paper from which the writing is.

Catharine McFetridge, of Brooklyn, N. Y., being too ill to come to Kingston, and it appearing that Mattie Holsten was her daughter, and necessarily in constant attendance upon her, an order was made for their examination before Hon. GEORGE B. ABBOTT, surrogate of Kings county. By consent of parties this examination was taken at the bedside of Mrs. McFetridge by the clerk of the Surrogate's Court of Kings county.

It appeared from the evidence of these two witnesses that they were on their way to church, when deceased called them in the basement of the house in Brooklyn, in which all three lived, and said either, "This is my will. I want you to sign it," or, "I have made my will. I want you to sign it. Just put your

name here," placing her hand on the back of it, according to Mattie Holsten, and saying either, "This is my will," or "I made my will. I want you and your daughter to sign it," according to testimony of Catharine McFetridge. She did not use the word "witness." The witnesses did not see the inside of the paper, nor the signature of deceased. They did not know that there was any writing at all upon the paper, nor did she sign it in their presence, nor tell them she had signed it, or in any way acknowledge that she had signed it. Neither of the witnesses knew her signature, or had ever seen her write.

It appears that Mattie Holsten signed her own name, and, as her mother had forgotten her glasses, she also signed her name, Catharine McFetridge, Mrs. McFetridge making her mark at the end of the signature, and the deceased saying that would do. The paper was laid on the table by deceased, and lay there while being signed by Mattie Holsten for herself and her mother.

The witnesses both testify they were on their way to church at the time of signing, but it does not appear from the testimony whether it was Sunday or not. August 15, 1890, was Friday.

Lucy H. Maginnis and Sarah J. Maginnis, granddaughters of deceased and daughters of Sarah J. Maginnis, legatee and devisee named in the paper, both testified that the paper offered for probate, and the signature thereto, were in the handwriting of Lucy H. Eakins; also, that they had heard deceased say that she had made a will, and everything she had should be their mother's after her death.

The legislature of this State deemed it proper to throw certain safeguards about the proper execution of a will. This is eminently proper and just. A will, by its very nature, has no force and effect during the lifetime of the person making it. While granting the right to an individual to determine to whom his property shall belong after his death, the State very properly directs, as a precautionary measure to guard against fraud, imposition or avarice, the methods by which that right must be exercised.

Among them are the following:

"Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

(1.) It shall be subscribed by the testator at the end of the will.

(2.) Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses, . . .

(4.) There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator." 2 Rev. St. 63, sec. 40.

It is claimed by the contestant that the requirements of subdivisions 2 and 4 of this section were not complied with, in that there was no signing in the presence of the witnesses nor acknowledgment of it, and that the witnesses did not sign at the end of the will. If I am correct in my view of the law as to the first proposition of contestant, it is unnecessary to consider the second.

Here, at least, was no subscription by the testatrix in the presence of each of the attesting witnesses, or pretense of it. It is equally clear that there was no acknowledgment by the testatrix to each or either of the two attesting witnesses. Showing a witness a piece of blank paper, with no signature or writing apparent upon it whatever, and saying, "This is my will," or "I have made my will. I want you to sign it," is not an acknowledgment of a subscription thereto by the testatrix, within the meaning of the statute. Attesting witnesses, by their nature, name and designation, are to attest or witness something, and that something is the signature to the will.

Two comparatively recent cases decided by the Court of Appeals deny probate to wills in which the facts are much stronger for probate than this case. *Mitchell v. Mitchell*, 77 N. Y. 596, affirming 16 Hun, 97; *Matter of Mackay*, 110 N. Y. 611.

In the first case, the deceased came into the store where the two witnesses were, and handed out a paper, and said, "I have a paper that I want you to sign." One of them took the paper, and partly opened it, and saw what it was. The witness probably, from his testimony, saw the signature. The testator said, "This is my will. I want you to witness it." Then the two witnesses signed the paper under the attestation clause. It does not appear that the other witness saw the testator's signature. The testator then took the paper and said, "I declare this to be my last will and testament." At the time of this transaction the paper had the name of the deceased at the end of the paper, but the witnesses did not see him sign, nor was there any acknowledgment by him of his signature in their presence, unless the facts above stated are such as acknowledgment. It will be seen that in this case there was an attestation clause. The deceased had actually subscribed at the end of the will, one witness probably saw his signature, and the declarations of deceased were much stronger than in the present case, yet probate was refused.

In the second case cited the subscribing witnesses came to the dwelling house of the deceased by previous appointment, and the deceased said, "Gentlemen, what I sent for you for was to sign my last will and testament." Thereupon he took from his writing desk the instrument offered for probate, and, laying it before the witnesses, said, "It is now all ready, awaiting your signatures." Both of the witnesses then signed, one of them making a remark showing that he understood it was a will. At the time of exhibiting the instrument to the subscribing witnesses, he told them it was his will, but handed it to them so folded that they could see no part of the writing except the attestation clause, and they did not see either his signature or seal.

Judge EARL, in delivering the unanimous opinion of the court, says: "The witnesses should either see the testator subscribe his name, or he should—the signature being visible to him and to them—acknowledged it to be his signature; otherwise

imposition might be possible, and sometimes the purpose of the statute might be frustrated." Probate was refused in this case; in my opinion, a much stronger case than the one now before me.

Considerable stress is laid by proponent on this being a holographic will, and it is insisted by her that in the probate of such a will the same rigid rules of construction should not be applied as when a will is prepared, and its execution supervised, by a careful attorney. It may be that this is so, and there are many cases that hold that a substantial compliance with the statute is sufficient, but there are no cases that hold that the requirements of the statute can be dispensed with in the execution of any kind of a will. This is not a case of negative testimony only,—the witnesses not recollecting whether certain acts were done or not,—but they testify positively that they were not done. The burden of proof is upon proponent to satisfy the court that the requirements of the statute were complied with.

It is not a pleasant duty for a court to deliberately set aside a document apparently designed by the deceased to effect a disposition of her property after her death. Courts, however, must carry out the will of the legislature in regard to proper execution of wills, and, where certain rules have been prescribed for the transmission of property, would-be testators must bring themselves within those rules, in order to take advantage of their benign provisions. The statutes of descent and distribution are now so just and equitable that those desiring a different disposition of their property must clearly manifest and carry out their disposition so to do within the prescribed forms of law.

Probate of the paper offered as the last will and testament of Lucy H. Eakins is denied, and a decree may be handed up to that effect. The good faith of the executrix named in the paper offered for probate not having been questioned, costs are awarded to proponent and contestant, payable out of the estate.

Probate denied, with costs to both parties payable out of the estate.

(Note as to acknowledgments of wills:)

An acknowledgment need not be made to both witnesses at the same time. (Matter of Diefenthaler, 39 Misc. Rep. 765.)

An acknowledgment is insufficient unless the signature is so far visible that the witnesses can see that it is that of the testator. (Matter of Laudy, 14 App. Div. 160.)

If the witnesses could have seen the signature, legally they did see it. (Matter of Carll, 38 Misc. Rep. 471.)

In the Matter of the Probate of the Will of JANE MENGE,
Deceased.

(Surrogate's Court, Oneida County, Filed July, 1895.)

1. WILL—EXECUTION.

A substantial compliance with the requirements of the statute in relation to the execution of wills is sufficient.

2. SAME—PROBATE.

A will may be admitted to probate although one of the witnesses denies that the usual formalities were observed.

3. SAME—ATTESTATION CLAUSE.

Where there is a contest as to what took place, the attestation clause is to be considered as bearing on that question.

4. SAME—PUBLICATION.

An affirmative answer to a question by the scrivener as to whether the testator wished the persons present to witness the will is a sufficient publication of the will and a valid request to the witnesses to attest the will.

Application for the probate of the will of Jane Menge.

Robert O. Jones, for proponent; Charles A. Miller, for contestants; C. Lansing Jones, special guardian for John Menge.

CALDER, S.—The usual answer of mental incapacity and undue influence was introduced in this proceeding, which was afterwards amended to include allegations of non-compliance with the requirements of the statute in reference to the execu-

tion of the instrument offered for probate. Upon the amendment the contestants rely, no testimony being offered to sustain the other objections.

The statute provides that certain formalities must be complied with to entitle a will to be admitted to probate. It is not necessary that any particular form be followed, or that any rigid rule of construction of the statute be imposed. Any other interpretation would be to confine the execution of testamentary documents within a narrow compass, and would in many instances defeat the expressed intentions of a person. The statute is satisfied if there be a substantial compliance with its requirements.

The instrument in question was prepared by George R. Wright, at the home of the decedent, and witnessed by William Hughes and Alexander E. Morgan. By the evidence of Wright it appears that the testatrix, after requesting that some paper be handed him, said, "I want you to draw a will for me." It was drawn in her presence, pursuant to her directions. The witnesses were summoned, and Mr. Wright, according to his testimony, said, "Mrs. Menge, here are Mr. Morgan and Mr. Hughes. Do you wish them to act as witnesses to this, your will?" To which she replied, "Yes, I do." Holding the will in his hands, he said, "You will have to sign it then." She answered, "I cannot write my name." She placed her fingers on the penholder and Wright wrote her name. The witnesses then signed their names. After the will was folded up, Wright said, "Mrs. Menge, what shall I do with this will?" She said, "You can give it to me." Hughes agrees with him as to what occurred in the presence of the subscribing witnesses. Upon the other hand, Morgan testifies that Wright held up the paper in his hand, and asked the testatrix if she wanted them to sign "those papers;" that the witnesses signed their names to the instrument before the testatrix signed; that at no time was the word "will" mentioned, or was there anything said or done to indicate that the instrument was declared by the testa-

trix to be her last will and testament, or that she requested them to sign any will as witnesses. He, therefore, testifies against the execution of the will.

The evidence of the subscribing witnesses is ordinarily, in a great measure, accepted as a true statement of the facts, but it is not conclusive. It is subject to be contradicted by other evidence, and in some cases by surrounding circumstances. It has been held not fatal to the valid execution of a will where one of the attesting witnesses has denied that the usual formalities have been observed. In the *Matter of Cottrell*, 95 N. Y. 329; *Orser v. Orser*, 24 id. 51.

It is evident that the testatrix understood the testamentary character of the instrument she signed. The scrivener had with him a book of forms, and it is to be presumed that he followed the directions therein contained.

The witness Morgan may not have given such attention to the formalities as to impress upon his mind what was actually said and done. His recollection may be faulty, without intending to misstate any of the facts. All the circumstances attending the execution are corroborative of the evidence given by Wright and Hughes, and their evidence may be considered a true statement of the transaction. The attestation clause is complete, reciting the requisite formalities, and the will on its face is in due form.

Following the rule laid down in *Orser v. Orser* and *Matter of Cottrell*, above cited, the attestation clause must give some weight in determining this controversy. The will was, therefore, signed by the testatrix in the presence of the witnesses, after which the witnesses signed; and, if this contest is to succeed, it must be on the lack of publication and request for the witnesses to sign.

The onus is upon the party seeking to sustain the instrument. The only evidence upon the question of publication and request is the statement made by Wright to Mrs. Menge, and her affirmative answer in response thereto. If this be not a sufficient

publication and request, the probate of this instrument must be denied.

It must be presumed from this evidence that Wright was acting for the testatrix, and what he did was with her consent, and by her directions. When he made the statement to the witnesses, to which she answered in the affirmative, it is the same as though the words were uttered by herself. *Gilbert v. Knox*, 52 N. Y. 125; *Peck v. Cary*, 27 id. 9.

It is not necessary that the publication and request be embodied in separate statements. "All that the statute requires is that the act of publication and the act of requesting the witnesses to sign shall both be performed. These acts are distinct in their nature or quality, but their performance may be joint or connected." *Coffin v. Coffin*, 23 N. Y. 9.

Nor is it essential that any precise words be used, or the exact phraseology of the statute employed, to observe the formalities with reference to the publication and request.

The communication made by the testatrix through Wright to the witnesses was a valid publication and a proper request. It was made known to them that the instrument was her will, and that they should sign the same as the attesting witnesses. This constituted the observance of the requisite legal formalities. *Coffin v. Coffin*, 23 N. Y. 9; *Matter of Hunt*, 110 id. 278; *Lane v. Lane*, 95 id. 494; *Darling v. Arthur*, 22 Hun, 84.

A due execution having been established, a decree admitting the instrument in question to probate should therefore be entered, with costs to the proponent, payable out of the estate.

Decreed accordingly.

Note.—A will may be admitted to probate although the second witness testifies that deceased did not declare that it was his will or sign in his presence. (*Matter of Carey*, 24 App. Div. 531.)

It may be admitted to probate although the testimony of one witness and the attorney as to the execution of the will is controverted by the other witness, who testifies to a reverse order of signing. (*Matter of Cornell*, 89 App. Div. 412.)

In the Matter of the Judicial Settlement of the Accounts of
FLORA E. HARTMAN, as Administratrix of ESTHER F.
HARTMAN, Deceased.

(Surrogate's Court, Herkimer County, Filed July, 1895.)

1. WITNESS—COMPETENCY.

A witness, though a party and interested in the event, is not incompetent under section 829 of the Code to testify to personal transactions or communications between the decedent and another, in which the witness took no part.

2. EXECUTORS—PAYMENT OF DEBTS—INTEREST.

An unliquidated claim which is to be adjusted and paid in the course of administration does not draw interest.

Motion by claimant to confirm referee's report except as to disallowance of \$1,902.33 of claim of Douglas Hartman, assigned to claimant, and motion by contestants to confirm the report except as to the allowance of interest, which they ask to be set aside and disallowed.

Upon the settlement of the account of said administratrix she presented claims against the estate of deceased, her mother, for \$4,268.98, being for services performed for deceased per agreement for thirteen years ten months and six days prior to the death of deceased, alleged to be worth \$3 per week, amounting to \$2,163, and for claim made by Douglas Hartman, her brother, against the estate of deceased for services performed for deceased, his mother, and moneys paid out for taxes, etc., pursuant to agreement, amounting to \$2,105.98, which was assigned to said administratrix after the death of said deceased. Contestants file objections; the matter was referred and the referee finds that there was an express contract whereby said administratrix was to be paid at the death of deceased and allowed her for 700 weeks at \$2 per week, making \$1,400, and that there was an agreement that Douglas Hartman was to be repaid for the taxes paid out and allowed \$203.65, making in

all \$1,603.65, with interest from the death of deceased, February 7, 1888, amounting to \$714. The claimant was called as a witness to show conversations between deceased and Douglas Hartman in regard to the claim which he has assigned to her, and after stating that she had heard the conversations, but did not take any part in them in any manner, was asked to state the conversations. This was objected to upon the ground that it was incompetent under section 829 of the Code of Civil Procedure. Objection overruled and evidence taken subject to strike out and which was struck out at the close of the evidence upon motion.

Steele & Prescott, for claimant; Henderson & Bell, for contestant, William Hartman; E. B. Mitchell, for contestant, Eugene Hartman.

SHELDON, S.—The referee erred in striking out the testimony of the claimant concerning conversations between the decedent, Esther F. Hartman, and Douglas Hartman, and in excluding other conversations offered in evidence between the same persons. The witness was a party, and interested in the event; but the offered evidence was not concerning any personal transaction or communication in which the witness had or took any part, in any manner, so far as appeared. The evidence was therefore competent. *O'Brien v. Weiler*, 140 N. Y. 281; *Cary v. White*, 59 id. 336; *Simmons v. Havens*, 101 id. 427.

The question of the allowance of interest is not free from difficulty. It is stated in the briefs of the parties opposing the claim that the claim exhibited does not demand interest. I have not been furnished with such claim, and cannot determine as to the correctness of that statement. Upon the evidence, however, I cannot find support for the allowance upon the claim of Flora E. Hartman for her services. It is difficult to see any material distinction between the facts of this case and the facts in the case of *Littell v. Ellison*, 44 St. Rep. 22,

which can aid the claimant. It may be that the facts in this case are less favorable to the requirements which must exist before interest can be allowed than in the Ellison case. In the Ellison case there was a breach of contract at the date of the death.

In this case the evidence discloses, and the referee has reported, that, if Mrs. Hartman did not sell her property during her lifetime, Flora was to have her pay out of it after her mother's death. The intention was, evidently, that the claim should be paid in the course of administration, as a claim against the estate; and the claim being an unliquidated one, to be adjusted and paid in the course of administration, it will not draw interest.

The statute of limitations is not a bar to the claim of Flora E. Hartman for services, or any part of it; and whether it may be a bar to any portion of the Douglas Hartman claim may better be determined after a rehearing, which will be necessary on account of the error of the referee in striking out the evidence of Flora E. Hartman, as above stated.

Motions denied and rehearing ordered.

In the Matter of the Judicial Settlement of the Accounts of
OLIVER M. ARKENBURGH *et al.*, as Executors of
ROBERT H. ARKENBURGH, Deceased.

(*Surrogate's Court, Rockland County, Filed August, 1895.*)

1. EXECUTORS—COUNSEL FEES.

The burden of establishing that counsel fees paid by an executor were fair and reasonable and that the services charged for were necessary and proper rests on the executor.

2. SAME.

An executor cannot be allowed for fees paid to counsel for doing things which he should have done personally.

3. SAME—COMPENSATION.

An executor may renounce the specific compensation provided by the will and claim the statutory commissions at any time before the decree.

4. SAME—INDEBTEDNESS OF.

The burden of proving an indebtedness of the executor to the estate rests on the contestant who seeks to surcharge the account.

5. DEVISEES—TAXES.

A devisee cannot be charged with taxes and insurance on the premises devised to him which accrued while the title was in testator's name.

6. EXECUTORS—ACCOUNTING—DECREE.

The surrogate has no power in the final decree to direct distribution to a sheriff who has levied an attachment upon the interest of an heir or legatee.

Judicial settlement of accounts.

Robert F. Little and Frank Arnold, for executor; J. W. Feeter, for executrix; Charles E. Souther, John Larkin and A. X. Fallon, for contestants.

TOMPKINS, S.—Letters testamentary were issued to Eliza J. Arkenburgh and Oliver M. Arkenburgh on the estate of Robert H. Arkenburgh, on the 25th day of September, 1890.

The executor and executrix made a joint petition to the surrogate of the county of Rockland on the 25th day of October, 1893, praying for a judicial settlement of the account of their proceedings. On the return of the citation an account was filed, which was signed and verified by the executor alone. Objections thereto were filed on the 27th day of February, 1894, by Robert H. Arkenburgh, Eliza J. Wiggins and Jeanette A. Knapp, children and legatees of the testator.

Thereafter further and supplemental objections were filed by them, and by James Wiggins, trustee of Jeanette A. Knapp, and Edward B. Arkenburgh.

After many hearings had been had on the issues raised by these objections, and on the 22d day of December, 1894, the ex-

ecutrix filed a separate account, to which objections were filed by the executor. The two accounts are substantially alike, except so far as the several objections affect them. The executrix, by her account, seeks to support and give force to the objections filed by the legatees, except as to the amounts paid for counsel fees, in which she participated.

The objections filed present a number of questions, which I will take up and consider in the order in which they were presented by counsel for the contestants on the argument and final submission.

The executor seeks credit for the sum of \$9,500, paid to Robert F. Little for counsel fees and legal services from September 24, 1890, to December, 1893. This item is objected to as unreasonable and excessive. The vouchers filed by the executor in support of the charge show all the items of the service rendered, and embrace all the legal services rendered to the executor during the period stated.

The testator left an estate of about \$1,000,000, consisting of valuable real estate in New York city, and largely of consolidated gas stock and government and municipal bonds; and the services charged for by counsel consist largely of matters connected with the making of contracts for the sale of real estate.

At the time of the testator's death there was no litigation pending against him except the McLoughlin suit, which was never revived or continued against the executors. There was no litigation in which the executors or the estate was involved during this whole period. The will was not complicated, nor were any of its provisions of doubtful meaning or construction.

There was real estate in several other States, in each of which States the executor's counsel, Mr. Little, procured the will to be probated by local attorneys. The amount paid to Mr. Little for disbursements was \$642.78, which is not included in the item of \$9,500. The services of counsel, in brief, were as follows: Probate of the will in Rockland county, which was accomplished without the issuing of a citation and by consent of

all the parties; the procuring of an order permitting the executors to advertise for claims; the appointment of appraisers; making of the appraisement and inventory, concerning which there was nothing unusual or extraordinary. There were 10 contracts prepared for the sale of 10 distinct parcels of real estate, and afterwards deeds were prepared, and the attorney attended upon the closing of the title. Those contracts were in the main the usual ordinary contract.

Hirsh, who contracted for sixteen lots, refused to take title to eight of them; and the executor's counsel made a submission of the matter to the Lawyers' Title Insurance Company, which afterwards insured the title.

The executor's counsel had previously examined the title for the testator when he purchased the property. The executor's counsel also procured an agreement from one Kirby, subjecting his property adjoining estate property to certain restrictions. He also secured the discharge of a mechanic's lien; corresponded with counsel in New Jersey in reference to assessments against estate property in the city of Rahway.

He also rendered services in an effort to perfect the title of the estate to a small gore lot, which result was never accomplished; corresponded and consulted with the board of health in reference to a complaint which had been made regarding the Seventy-fifth street lots. He attended to the payment of two or three mortgages, procured tax bills and paid them, looked after repairs to the real estate, and received interest due the estate.

He also charges in this item for work done in preparing and arranging the vouchers, etc. Many interviews with the executor and executrix are set forth in the vouchers, and the testimony of the attorney, his books and vouchers, very fully describe the exact character and extent of the services rendered by him, and the contracts, submissions, and agreements which he prepared have been put in evidence.

The burden of establishing the fairness and reasonableness

of this charge for counsel fees is upon the executor, and the executor must show that the services charged for were necessary and proper. *In re Archer*, 23 N. Y. Supp. 1041.

Much of the service rendered by counsel is not the proper subject of charge against the estate. It was the executor's duty to collect interest, look after repairs, procure tax bills and pay them. It does not appear that there was anything in these matters that called for or required the services of a lawyer. The fact that the executor was absent from the city, or that it was convenient for him to have his attorney do these things, does not justify a charge being made against the estate. He must pay his attorney personally for such services.

For the services of counsel which the executor should be reimbursed for, a fair and reasonable compensation should be allowed.

In determining the amount to be allowed, I consider as the first and most important element the work actually performed; second, the amount involved; third, the standing and reputation and learning of the lawyer; fourth, the result of the services.

Here the work has been fully testified to, and, while the amounts involved were large, they were not involved in litigation, but were for the most part in real estate, which could not well be jeopardized, and the value of which did not depend upon legal skill or learning. The ability and integrity of the attorney are conceded, and, for such services as he rendered, he is entitled to as large compensation as any court should ever allow. For such services on the whole case, I am convinced that \$6,000 is adequate and liberal compensation; in fact, from the testimony given by the witnesses called on both sides, it is difficult to justify a charge of that amount.

The executor called Payson Merrill and John M. Scribner as witnesses in support of the charge. They testified generally on the direct-examination, without giving any items, that the charge of \$9,500 was reasonable. On cross-examination Mr.

Merrill gives the following items: \$250 to \$500 for probate of the will; \$25 to \$50 for each contract and closing title. He did not separate the various items of the bills, but calculated about the number of days occupied by Mr. Little, and then estimated that his services were worth from \$75 to \$100 per day.

Mr. Scribner says that \$9,500 was a fair charge for all the work; that \$1,000 would have been a reasonable amount as a retainer, and for all services on the probate of the will, including making the inventory and advertising for claims; \$25 to \$50 for real estate contracts and closing title. He says that there was nothing in these contracts to justify extra charge; \$1,000 for all the work in connection with the account, down to the engrossing of it, which he includes in the estimate of \$9,500. He fixes the value of the argument and submission to the title insurance company at \$1,500. After giving these items, he was asked how he made up the balance of the \$9,500, and he stated: "I can't make up the balance."

James K. Bishop and Edward R. De Grove testified on behalf of the contestants; Mr. Bishop stating that all the services, exclusive of the work on the account, were not reasonably worth more than \$4,000, and that the account was worth from \$1,000 to \$1,500. In detailing the value of the different services, he says that the probating of the will was worth \$250; the submission to the title insurance company, from \$500 to \$750; \$10 to \$25 for preparing each contract, and \$25 for closing the title; \$200 for the Farley contract, sale and procuring Kirby agreement, and he allows \$1,500 for general services, including interviews, receipt of letters, etc.

De Grove fixes the value of all the services, including the preparation of the account, at \$5,500 at the outside figure. He fixes the services on probate of the will at about \$1,000. These witnesses are not so far apart when they give the items, but their totals widely differ. When the items of all the witnesses are taken, it will be found that the result comes very near the totals given by the contestants' witnesses.

Now, allowing as a retainer and for the probate of the will, including all services to the advertising for claims, the sum of \$1,000, which is the highest figure put upon these services by the executor's witnesses, and the sum of \$500 for the preparation and consummation of the ten contracts, the sum of \$400 for the submission to the title insurance company, \$50 for the Kirby agreement, \$300 for procuring probate of will in the three other States, \$50 for Rahway tax matter, \$50 for O'Hare lien, \$150 for gore-lot services, \$50 for board of health matter, \$1,000 for services in reference to account; add to these amounts \$2,000 for interviews, letters received, writing letters, and general advice, and services set forth in detail in the vouchers,—and we have a total of \$5,650.

The foregoing amounts are very liberal allowances, and are in excess of the average fixed by the expert testimony. Most of these payments were made by the executor and executrix together. It appears that all of the amounts paid to the counsel, except the sum of \$1,768.22, were paid by both executor and executrix. In the payment of the last-named amount the executrix did not unite.

They will be allowed the sum of \$6,000 for counsel fees paid to Mr. Little, and the proportion of the difference to be borne by the executor and executrix will be fixed by me on the settlement of the decree.

The next question presented is in reference to commissions of the executor and executrix.

The will contained the following provision: "I direct that the sum of one thousand dollars, and no more, shall be allowed to or received by each of those who shall qualify as executrix or executor hereunder, as and for their commissions; and said sum shall be in lieu of the commissions allowed by law."

The will was admitted to probate on the 25th day of September, 1890, at which time letters testamentary were granted. On the 29th day of May, 1893, the executor filed in this court his renunciation of the specific compensation provided by the will;

and in the month of December, 1893, the executrix filed a similar renunciation. Since then the executrix has filed a retraction of her renunciation, but during the contest it was stated by counsel for the executrix, or by the executrix, that she desired to withdraw her renunciation retraction, and that, if the executor received full commissions, she wanted the same. Her former counsel was not explicit as to his client's position in reference to the question of commissions.

It is contended by the contestants that on the day the will was read, and before it was probated, the executor and executrix were both asked whether they were satisfied by the provision of the will for their compensation, and that they answered that they were; and it is claimed that they elected and agreed to accept the specific compensation, and were thereafter estopped from renouncing it and claiming the statutory fees.

I think that this claim is not good. The Code gave them the right to renounce the specific compensation, and no time is fixed for that purpose. Section 2730. It has been held that it may be done at any time before the decree is made. *Matter of Weeks*, 5 Dem. 194.

Action in reference to this matter was not essential to the probate of the will, or to entitle the executors to qualify. They were under no obligations to the legatees in respect to the commissions.

The elements of an estoppel do not exist, and the executor is entitled to the commissions allowed by statute. Whether the executrix has successfully retracted her renunciation, and, if she has not, the proportion of the commission to be awarded to the executor and executrix, I will determine upon the settlement of the decree.

The contestants claim that the executor was indebted to the testator in his lifetime and at the time of his death in about the sum of \$40,000.

The executor charges himself in his account with the sum of

\$3,000, which appears on the books of the testator against him, and which he admits is a proper charge against him.

By subdivision 15 of schedule J of the account, the executor explains that charges aggregating \$5,983.42, appearing on the books of the testator against him, from the date of the will, to wit, February 26, 1889, down to the testator's death, were paid to him for services rendered to the testator, and were paid to him by testator, and that he is not indebted to the estate for the same.

The contestants, on the other hand, claim that the executor, during that period, and during several years prior thereto, took from his father large sums of money, including the above amount of \$5,983.42, in excess of the amounts to which he was entitled for services, and with which he should now be charged.

The burden of establishing this claim rests upon the contestants. It is claimed that the executor was only entitled to receive \$1,800 per year down to the date of the testator's death. The books of the testator, kept in the main by the executor, have been put in evidence, from which it appears that sums largely in excess of that amount were received by the executor, and not returned; and testimony has been given of statements made by the executor to the effect that he would not pay any amount to the estate or charge himself with any indebtedness until it was proven, and the testimony of the executrix is given to the effect that in 1890, and a short time before the testator's death, she saw a paper in his possession called an "inventory," such as the executor was in the habit of making out for the testator, made out by the executor, which showed, among other things, that Oliver M. Arkenburgh, the executor, was indebted to his father in the sum of about \$15,000.

This is all denied by the executor.

The testator was a large dealer in the tobacco business. He had interests in Kentucky, where the tobacco was grown and purchased by him, and he had an office in New York city. He

owned many valuable pieces of real estate in New York city, and was the holder of considerable stocks and securities.

In 1867, when Oliver, the executor, left college, he entered his father's New York office, and remained there until about the year 1877, when he left.

He testifies that in 1878 his father called upon him at his boarding house, and said that he wished him to come back with him immediately, and said that he would allow him a sum sufficient for his maintenance according to the way in which he was brought up. No amount was stipulated between them. Oliver went then to his father's office, and continued in his employ down to the testator's death, acting as his bookkeeper, confidential clerk and manager, and devoting all of his time to his father's service; and he claims that all the money shown by the books to have been received by him were under the agreement made in 1878, by which he was to be supported in the manner in which he was brought up.

After a careful examination of all the testimony and the exhaustive briefs of counsel, I have concluded that the contestants have failed to establish the alleged indebtedness.

The claim of the executor that such a contract was made by his father, and that he was not limited to \$1,800, is corroborated by the fact that on several occasions, in several places in the books, amounts are credited to him for services in excess of \$1,800; and on June 20, 1888, the testator made and signed the following memorandum:

"Whereas, Oliver M. Arkenburgh has rendered certain services to me in keeping my accounts and looking after my affairs generally, including my estate, during the years 1882, 1883, 1884, 1885 and 1886, it is hereby mutually agreed that he shall be allowed and take credit in account for the sum of \$7,789.74 for the years mentioned, which sum shall be in full settlement and discharge for any and all claims he may have for services rendered in my behalf during said years above mentioned, which

amount has already been paid to him, having been drawn from time to time during the aforesaid years."

This clearly indicates the desire and intention of the testator to allow the executor for his services the amount which the books at that time showed him to have received, which was largely in excess of \$1,800 a year.

It must be presumed that the testator knew the contents, or the substance of the contents, of the books. They were always accessible to him. Several times each year during all of that time he had received statements or inventories from his son containing, in brief, the state of the various accounts; and there is no proof that during all of those years any complaint was made by the testator concerning the manner in which they were kept, nor were any inaccuracies ever charged.

A power of attorney was given by the testator to the executor, which was revoked at the request of the executor April 1, 1889; and he testifies that he accounted to his father for all moneys received by virtue of that power of attorney, and there are not sufficient circumstances to overcome that testimony.

That the testator knew the condition of his books generally, and the character and effect of the various entries therein against his sons, is evidenced by the release which he made on the 10th day of December, 1888, by which he released his sons, Robert, Oliver and William, from all and every claim and liability to him by reason of the tobacco business carried on under the firm name of "O. M. Arkenburgh & Co." and the name of "O. M. Arkenburgh," and from all liability by reason of entries in his books growing out of these transactions; and those entries and the particular character of the several entries are fully set forth in the release, showing the testator's familiarity with the books.

He was concededly a shrewd and careful business man, at his office almost every day, and in almost constant contact with his business affairs and financial matters; and it does not seem reasonable that covering a period of ten or twelve years he should have been so deceived by Oliver, and blind to the fact

that upward of \$40,000 was being taken from him unlawfully. It is clear that he knew during these years that Oliver was receiving much more than \$1,800 per year, and that in 1888 he expressly sanctioned it by personally crediting him with the sum of \$7,789.74, which had not been previously directly credited to him; and it must be assumed that this amount included all the sums with which Oliver was then chargeable.

I find from the books in evidence that, from 1878 to the death of testator, Oliver received about the sum of \$69,000, making an average of about \$5,400 per year, and that the same was received pursuant to the agreement of 1878, and was so understood and agreed by the testator.

Another fact which very strongly corroborates the executor's claim is the provisions of the will in reference to advances.

The will was made on the 26th day of February, 1889, and after the testator had knowledge of the fact that his son Oliver had retained some, at least, of these large amounts of money.

The will is a very carefully drawn document, and must have been the result of much careful thought, after a thorough examination of his books and a full knowledge of the condition of his affairs.

After dividing the estate, the will provides as follows:

"Provided always, and I hereby declare, that, if I shall in my lifetime advance or give to any of my children any sum or sums of money for his or her advancement or benefit, then every such sum shall be taken in or towards satisfaction of the provision intended to be hereby made for such child, and shall be accounted for accordingly; and

"I hereby further declare that the only advancements which have been made to any of my children up to and at the date of this, my will, are such as have been made to my son, Robert H. Arkenburgh, as follows: On the first day of January, 1885, my said son Robert had received from me the sum of twenty-four thousand dollars, etc."

The will proceeds to specify other amounts had by the testa-

tor's son Robert, and charges all the amounts against him. By this provision the testator shows his familiarity with the state of the account with Robert, incidentally with the contents of the books, at least so far as Robert was concerned.

Here is a positive and express declaration that Oliver was not at that time indebted to him, and that no advance had been made or moneys received by him which could be construed into an indebtedness.

This positive statement that no indebtedness existed can only be overcome by clear and convincing evidence that the testator had been deceived by Oliver, and was ignorant of the condition of his account and of his acts and conduct. Such convincing proof is not given.

After the date of the will, it does not appear that advances were made to Oliver. At least there is no proof of the receipt of any moneys by him after that date, except various sums appropriated for living expenses as before, and the sum of \$3,000, which was placed in his hands for a specific purpose and never used, and for which he now accounts. Nor do the books show any charge against him of an advancement.

The executor seeks to charge Robert H. Arkenburgh with the items contained in Schedule B, aggregating \$2,494, which he seeks to have deducted from Robert's share of the profit of tobacco accounts Nos. 10 and 11. The first twelve of these items, excepting one item of \$25 (November 22, 1889), are objected to. It is sought to make out these charges by an account stated between them.

The executor testifies that in October, 1890, he handed to Robert a pencil memorandum containing these charges against him, and showing a balance in Robert's favor of \$223.91, and that Robert put it in his pocket, but said nothing. Robert denies that he ever received the statement.

The executor has failed to make out an account stated between them.

From the testimony, however, I find that the following items

should be charged against him; \$64.25, money advanced by testator to pay premium on life insurance while Robert was in Kentucky; \$25, paid to Dr. Davis; \$22.50, insurance on furniture in Robert's Kentucky house.

The items for taxes and insurance on the Kentucky house are not allowed as charges against Robert, for the reason that the premises were then owned by the testator, and, while it is true that the conveyance was probably made to protect it from Robert's creditors, nevertheless the title was in the father, and remained in him until his death, and Robert testified that he deeded it to his father to secure him against certain losses. The father devised that particular property to Robert by his will, but that fact, even if his intention to do so was known by Robert, would not cast upon the prospective devisee the duty of paying taxes in anticipation of the devise and death.

As to the other items of that account against Robert, to wit, \$225, \$579.80 and \$100, I am not clear, and will hear counsel further in respect thereto upon settlement of the decree.

The claim of Robert to the sum of \$677.71 for services in selling tobacco for the executor is disputed by the executor, and is not such a claim as can be determined upon this accounting. It must be enforced by an action. It is not part of the joint tobacco account between the testator and his three sons, but is an independent claim against the executor for services rendered the estate.

In an action between Oliver M. Arkenburgh and Robert H. Arkenburgh a warrant of attachment was issued to the sheriff of the city and county of New York against the interest of Robert H. Arkenburgh in this estate. The warrant was put in evidence and it is now claimed by the executor that the decree herein should recognize the lien of the said attachment, and provide for the payment over to the sheriff of whatever sum may be found to be due Robert.

The surrogate has no power to determine the validity of the attachment. In fact, there is no proof before me that the at-

tachment is still in force. The sheriff is not a creditor of the deceased, nor a legatee, nor does he stand in the position of an assignee of a creditor or legatee, within the provisions of Code, section 2743.

The case of *Estate of Gilligan*, 3 N. Y. Supp. 17, cited by counsel for the executor, is not applicable. There the intervening party was a receiver in supplementary proceedings, and represented and stood in the place of a judgment creditor whose claim was not disputed. An attachment simply secures and holds the property until the plaintiff can establish his claim.

The surrogate only has such power as is conferred by statute or necessarily implied from the powers so conferred. *Matter of Underhill*, 117 N. Y. 471.

Section 2743 of the Code alone confers the jurisdiction and power of the surrogate in the making of the decree.

That section only authorizes a distribution to the creditors, legatees, next of kin, husband or wife, or their assigns.

The word "creditors" means creditors of the deceased. *In re Redfield's Estate*, 25 N. Y. Supp. 4.

And nowhere is the surrogate given power to distribute to any other person. The sheriff is not either a legatee, assignee of a legatee, or creditor of the deceased.

Costs to all parties out of the estate, to be fixed on settlement of the decree.

Ordered accordingly.

**In the Matter of the Judicial Settlement of the Accounts of
the Executor of MARY J. HAVEMEYER, Deceased.**

(Surrogate's Court, New York County, Filed August, 1895.)

REFERENCE—DECISION.

The amendment of 1894 to section 1022 of the Code does not apply to referees in Surrogates' Courts, so as to relieve them from the duty of stating separately their findings and conclusions of law.

Accounting by an executor. The parties to the proceeding move for an order to send back the report of the referee for correction, and to require him to state his findings of fact and conclusions of law separately.

Butler, Stillman & Hubbard, for executor.

FITZGERALD, S.—A referee was appointed herein by the surrogate, under section 2546 of the Code of Civil Procedure, to examine the accounts of the executor, and to hear and determine all questions arising upon the settlement of said accounts which the surrogate had power to determine. The referee filed his report, and also three sets of proposed findings of fact and conclusions of law which had been passed upon by him upon their submission by the parties. The report or decision does not state separately the findings of fact and conclusions of law made by the referee, nor does it contain any of the proposed findings of fact and conclusions of law passed upon by him, although they were filed with it and the opinion of the referee in this office. This is a motion made by parties in interest for an order sending the report or decision back for correction, and directing the referee to state therein separately the facts found, and the conclusions of law, and also to embody and include therein all the findings of fact and conclusions of law heretofore found by him at the request of either or any of the parties therein.

Section 1022, prior to its amendment by chapter 688 of the Laws of 1894, provided that the court or referee, in making a decision upon trial of the whole issues of fact, must state separately the facts found, and the conclusions of law. Section 2546, at the time of such amendment, declared—and it has never since been changed—that the provisions of the Code applicable to a reference by the Supreme Court apply to a reference by this court, so far as they can be applied in substance, without regard to the form of the proceeding. Section 1022, as amended, provides that the court or referee, upon the trial of the whole issues of fact, may file a decision stating concisely the grounds upon which such issues have been decided, and direct the judgment to be entered thereon.

It is claimed that under sections 2546 and 1022, as amended, the referee herein is not required to make findings of fact and conclusions of law. The claim, I think, is untenable. Section 2545 requires the surrogate, upon the trial of an issue of fact, to file in his office his decision in writing, which must state separately the facts found, and the conclusions of law. It would be highly improbable to suppose that the legislature, by the amendment mentioned, intended to create the anomalous condition of relieving referees appointed by this court from making the findings which are exacted from the court itself. The purpose was, no doubt, to simplify and improve the practice, for the benefit of the courts mentioned in section 1022, as well as for the benefit of referees appointed by such courts; and these courts are indicated by section 3347, subd. 7, of the Code. I think the application of the amendment is confined to these last-mentioned courts, and has no reference to this court or its referees.

The referee should also embody in his decision all the findings of fact and conclusions of law found by him at the request of any of the parties. *Nobis v. Pollock*, 26 St. Rep. 155; *Schultheis v. McInerny*, 37 id. 537.

Application granted.

In the Matter of the Estate of SIDNEY SMITH, Deceased.

(*Surrogate's Court, Madison County, Filed October, 1895.*)

1. COLLATERAL INHERITANCE TAX—CONCEALMENT OF FACTS.

The concealment of facts by an administrator is no ground for setting aside an appraisal made under the Act of 1885.

2. SAME—ERRORS—HOW CORRECTED.

An error of the appraiser, in refusing to appraise a judgment in favor of the estate against one entitled to share in the estate, is not ground for setting the appraisal aside, but can be corrected only by appeal.

3. EXECUTORS—LIMITATION.

The right of the administrator to retain from the share of a distributee the amount of a debt due from him to the decedent is not affected by the fact that the debt is barred by the statute of limitations.

Proceeding to set aside an appraisal.

H. M. Aylesworth, S. D. White, H. B. Coman and E. R. Olcott, for comptroller; Man & Man and S. M. Lindsley, for estate.

KENNEDY, S.—This is a proceeding to set aside the appraisal and assessment of the collateral inheritance tax upon the estate of Sidney Smith, deceased, upon the ground of alleged fraud and fraudulent concealment of facts by the administrator at the time of the appraisal of the estate in 1888.

We must deny the application for the following reasons:

Excluding the Adams judgment, to which we hereafter refer, the State claims that some or all of the committees who have had charge of Sidney Smith's estate during his lunacy, from 1848 to his death, in 1886, have been guilty of great irregularities in the management of his property, and that, at the time of the appraisal, said committees were indebted to his estate in a large sum of money, which ought to have been taxed.

Without examining the evidence to ascertain whether this claim is true or not, we shall hold as follows:

At the time the assessment was made the statute did not authorize the appraiser to subpoena and compel the attendance of witnesses for the purpose of ascertaining under oath the condition and amount of the estate. He was without power to make any investigation, save by personal observation and inquiry. In this case the appraiser did all he was authorized or empowered to do under the law as it then was in determining the amount of property liable to taxation. Having made use of and exhausted every remedy then provided for the appraisal of this estate, the State is bound by his acts and conclusions, unless he committed errors for which an appeal might have been taken.

The Collateral Inheritance Tax Act of 1885 imposed no duty or obligation upon the administrator of this estate to voluntarily aid the appraiser in any manner whatever in making the appraisal, or to make any statement, disclosure or proof as to the condition or amount of the estate he represented any more than a private citizen is under obligation to inform the tax assessor of the amount and condition of his property for the purpose of an assessment. We, therefore, hold that the administrator was not guilty of any fraudulent acts of commission or omission in connection with the appraisal of this estate.

Even if the appraiser had been informed that there were irregularities in the management of the lunatic's estate from 1848 to 1886, by reason of which the several trustees were indebted to said estate, he would have been justified, and we think it would have been his duty, to hold that the claims arising therefrom had no fair market value, because he had no power to investigate the matter, and even if he had possessed the power, because of the long, expensive and uncertain litigation that would have been necessary to ascertain the fact.

In view of the statute as it was at the time of the appraisal, we think this estate, upon this branch of the case, has been

legally submitted to the appraiser, and the assessment for this reason cannot be set aside, except for errors, for which an appeal is the only proper remedy.

Second. It is claimed by the State that the balance due upon the Adams judgment, amounting to about \$60,000, should have been appraised. We so hold, but the remedy for the error was by appeal in due time from the assessment, and not by proceedings to set the same aside. The administrator had a lien and right of detention upon the distributive share of Adams in said estate to the amount of his indebtedness to it, which could have been enforced upon the judicial settlement of the estate by simply deducting the same from the amount to which he was entitled, and it would have been the duty of the surrogate to make the decree accordingly. It is an undisputed fact that the Adams share of the estate was in excess of the amount due upon the judgment, and also that the administrator had sufficient funds in his hands to pay it. Under such circumstances the opinions of Smith or Underhill to the market value or collectibility of this claim are of no consequence; for, upon the facts above stated, the law had settled the question of its value by declaring that the administrator had a lien or right of detention upon sufficient assets then in his hands to pay the same in full, and provided a remedy for its collection. Even if the Adams claim had not been put into judgment, the statute of limitations would not have been a bar to the recovery of the debt in the manner above stated. *Rogers v. Murdock*, 45 Hun, 30. The appraiser may have been misled by the statements of Smith and Underhill because he was not aware of the law applicable to this branch of the case. His conclusion as to the value of the Adams claim was erroneous, but the error was one that should have been corrected by appeal from the assessment.

Third. This Surrogate's Court has heretofore held, by its order of March 16, 1889, that the proceeds of Alabama lands were exempt from taxation, and no reason appears why the ruling upon that question should be changed.

An order will therefore be entered dismissing these proceedings, with \$250 costs, to be paid by the comptroller of the State of New York.

Ordered accordingly.

In the Matter of the Estate of MARY HACKET, Deceased.

(Surrogate's Court, Rockland County, Filed October, 1895.)

1. TRANSFER TAX—NON-PAYMENT.

The fact that the entire estate was distributed before the transfer tax was assessed is not a legal excuse for its non-payment.

2. SAME—OBJECTIONS.

An objection to the amount of the assessment cannot be raised for the first time on a motion to compel payment of the tax.

Motion to compel payment of the transfer tax.

Frank Comesky, for administratrix.

TOMPKINS, S.—This is a motion made by the district attorney to compel payment of the transfer tax heretofore assessed herein.

Mary Hacket left but one next-of-kin, to wit, Elizabeth Hacket, the administratrix. On the 12th day of June, 1893, the final account of the administratrix was settled, by which the sum of \$13,465.37 was found in her hands, which amount, by the decree, the administratrix was directed to retain as the only next-of-kin of the deceased.

No proceedings were ever taken by the administratrix to have the transfer tax determined, and, subsequent to the said accounting, an appraiser was appointed by the surrogate, and subsequently an order made fixing the amount of the tax to

which the said estate is liable at the sum of \$134.65. This order was made on the 11th day of June, 1894.

A notice was immediately thereafter served upon the administratrix of the making and filing of the order assessing the tax, and the amount thereof. No appeal has ever been taken from that determination, and no proceedings have been taken by the administratrix, and the tax has not been paid. In answer to this motion, the administratrix alleges that the whole amount of \$13,465.37, received by her under the decree, had been paid out by her on her own account prior to the assessing of the tax. This is no legal excuse for the non-payment of the tax. The law makes it the duty of the representative to have the tax assessed and paid, and an executor or administrator is personally liable for the tax until its payment. The tax is further declared to be a lien upon the property transferred until paid.

The statute is positive and mandatory, and the surrogate has no discretion in the matter.

The further claim is made by the administratrix that in making her account she did not credit herself with physician's charges, undertaker's bill, cemetery charges, and other charges, and that she waived the commissions to which she was entitled by law, and that by reason thereof the balance found by the decree to be in her hands was more than the amount of the estate which was liable to the tax, and the claim is made that the estate which was liable to payment of the tax did not exceed the sum of \$6,750.

It is too late now to make this claim, and there is no way under the statute by which I can permit the matter to be opened and proof taken to correct the mistake.

The administratrix had full opportunity before the appraiser to state the facts now alleged in her affidavit, and there was given a full opportunity to have deducted from the bulk of the estate the debts and proper charges.

Again, the order fixing the tax was served upon her, and by

it she was apprised of the amount of the tax, and the statute gave her sixty days within which to appeal from the determination. By failing to take advantage of her right of appeal, she is barred from raising any question now as to the correctness of the amount assessed. It is a well-established rule that the time fixed by the statute within which an appeal may be taken cannot be extended or enlarged by the court.

Let an order be presented requiring payment of the tax and accumulated interest within ten days, with \$10 costs of this motion.

Ordered accordingly.

In the Matter of the Estate of SOPHIA L. COBB, Deceased.

(Surrogate's Court, Westchester County, Filed October, 1895.)

1. EQUITABLE CONVERSION.

It is the intent of the testator, and not the practical convenience of treating the estate in one form rather than another, that is to govern the determination as to whether there is an equitable conversion under a will.

2. SAME.

The mere fact that the inventory shows an insufficiency of assets to pay all legacies and trusts and that a naked power of sale is given to the executors, is insufficient to show an intent to create an equitable conversion where some of the legacies have lapsed and it appears that the securities have greatly depreciated.

3. TRANSFER TAX—LEGACIES PAYABLE FROM REALTY.

Although there be an equitable conversion, it does not take effect until testator's death; and where the realty as such would be exempt under section 2 of the act, a legacy payable from the proceeds thereof is also exempt.

Appeal by the county treasurer from an order of the surrogate, confirming the report of the appraiser under the act in

relation to taxable transfers of property, and adjudging that the estate of decedent was not subject to the tax.

The following is the opinion of the appraiser:

MIDDLEBROOK, Appraiser.—This proceeding to determine the question of the amount of the transfer tax to be assessed upon the legacies under Mrs. Cobb's will involves a construction of the will by the appraiser. It therefore seems proper to submit the reasons for the findings contained in the report filed herewith.

It is claimed by the county treasurer that the will works an equitable conversion, and that therefore the entire estate is subject to taxation. While there might be questions raised as to whether, under the will, the legacies are charged upon the testatrix's real estate (*Lupton v. Lupton*, 2 Johns. Ch. 628; *Hoyt v. Hoyt*, 85 N. Y. 142, 149, 150; *Briggs v. Carroll*, 117 N. Y. 288-292; *Morris v. Sickly*, 133 N. Y. 456; *Hogan v. Kavanaugh*, 138 N. Y. 417), that question may be eliminated as not being necessary to the determination sought.

The questions then remaining are: (1) Did the will work an equitable conversion? And (2) if there be an equitable conversion, does the tax attach? Taking these in order: 1. "Conversion arises only from an express, clear and imperative direction, or from a necessary implication of such express direction. The question of conversion is one of intention, and the question is, did the testator intend to have his real estate converted into personalty immediately upon his death? If he did, a court must give such intent effect, and treat the realty as personal property from that time. If, however, he intended to give the executor or trustee under his will a power to convert, leaving it discretionary with him to convert or not, the conversion will depend on the will or discretion of the executor or trustee, and will not be regarded as consummated in law until it is consummated in fact." *Clift v. Moses*, 116 N. Y. 144, 157.

The cases fall into two classes in accordance with the above definition. Those of the first class, where the will contains

"an express, clear and imperative direction," are fairly instanced by *Moncrief v. Ross*, 50 N. Y. 431, and *McDonald v. O'Hara*, 144 N. Y. 566, and need no comment. The other class, where the intent to convert is implied, is illustrated by *Dodge v. Pond*, 23 N. Y. 69; *Power v. Cassidy*, 79 id. 602; *Lent v. Howard*, 89 id. 169, and *Delafield v. Barlow*, 107 id. 535. An examination of these cases show that in each instance the conversion is predicated upon the intent of the testator, as evidencing an imperative direction, implied as necessary to carry out the scheme of the will. It is the intent that governs, and not the practical convenience of treating the decedent's estate in one form rather than another. While inquiry into the conditions existing at the time of the making of the will is permitted, it is solely for the purpose of aiding the court in arriving at the intent, and convenience and expedience have nothing to do with the solution of the question.

No express provision being made in the will for a conversion of the realty into personalty, every intendment is antagonistic to such an intention. If such had been the intention, it is to be presumed that apt and appropriate language would have been used to convey it, commanding and directing that this should be done. It would not have been left to be inferred by the use of ambiguous terms or doubtful phraseology, but the will would have contained positive provisions indicating the testator's intention. In *White v. Howard*, 46 N. Y. 144, 162, it was laid down by GROVER, J., that, "to constitute a conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of and obligatory upon the trustee to sell it in any event. Such conversion rests upon the principle that equity considers that as done which ought to have been done." *Hobson v. Hale*, 95 N. Y. 588, 605. "While the will should be supported if it can be done upon any fair construction of its provisions, this rule has never been carried to such an extent as to hold that an out and out conversion is to be inferred in

the absence of imperative directions, expressed or necessarily implied, to the executors to sell the real estate." Id. 608, 609.

The will of Mrs. Cobb is simple, and presents no ambiguity. It contains (1) certain legacies of specific sums, aggregating \$3,500 in money; (2) provisions for two trust funds, aggregating \$7,000, both of which lapsed by reason of the death of the beneficiaries before the testatrix; (3) a general bequest and devise of the rest, residue and remainder of her estate, real, personal and mixed, to four children; (4) a power of sale by the executors. This will was executed November 14, 1885. By codicils executed in 1890 and 1891 she made a further bequest of \$1,500 and revoked one of \$500, so that the total of the legacies and trust funds provided for was \$11,500. The legacies amounted at her death to only \$4,500, the trusts being eliminated, *supra*. The inventory of the personal estate shows a total of \$5,100. Upon these facts, that the will provides for the distribution of \$11,500 as personalty, and that it contains a naked power of sale, and that the inventory shows only \$5,100 of personalty, it is urged in behalf of the county treasurer that there is an equitable conversion. It is difficult to see how this contention can be supported. The language of the will would equally apply to realty and personalty. *Hobson v. Hale*, Id. 598. And, moreover, it seems to recognize the distinction between them by the words employed.

The facts are not such as to disclose such an intent to convert on the part of the testatrix. An examination of the inventory shows that the par value of the personal estate would be \$10,000, and that the depreciation in the securities shown herein has occurred since the making of the will and codicil. It may very well be that testatrix did not change her will in view of the depreciation and consequent shrinking of her personal estate by reason of the fact that the death of the beneficiaries of the \$7,000 had produced a lapse of her bequests to that extent. Outside of the will itself there is little evidence to show what was in her mind as evidencing her intent. There is nothing to

indicate but that, at the time of making her will, testatrix's personal estate fully equaled or exceeded \$11,500. The rule which might be deduced from *McCorn v. McCorn*, 100 N. Y. 511, would, therefore, not apply. The reasoning in *Briggs v. Carroll*, 117 id. 288, 292, on the question as to whether a legacy was charged on real estate, would seem to be equally applicable to this case. In that case Judge FINCH says: "We are very far from saying that a residuary clause, blending in its form of disposition both real and personal estate, will produce a charge upon the former for the payment of legacies wherever the personal estate proves insufficient. No such doctrine can be justified. The deficiency must exist when the will is executed, and be so great and so obvious as to preclude any possible inference that the testator did not realize it, or that he may have expected and intended before his death to remove the difficulty." This is especially pertinent in view of the fact that the questions involved herein do not arise independently of the question whether the legacies are charged upon the real estate. No such deficiency is shown to have existed at the time of the making of the will as, coupled with the will, would warrant the conclusion that the testatrix intended that her real estate should be converted into personalty, and the consequent implications of an imperative direction to convert. There was, therefore, no conversion as of the date of testatrix's death.

If the executors did sell under the power, the conversion should not be "regarded as consummated in law until it is consummated in fact" (*Clift v. Moses*, *supra*), and such sale does not make the proceeds taxable as personalty, the taxation being of the date of the death.

2. It is also our opinion that the estate would not be taxable even if the will did work an equitable conversion of the real estate into personalty.

It must be borne in mind that this proceeding is under a statute imposing a tax. That statute must be reasonably strictly construed against the State. It might be seriously doubted if

this equitable theory could be recognized at all in a statutory proceeding such as this. But it has been by a surrogate of a remote western county (*Matter of Wheeler*, 1 Misc. Rep. 450), who says (at pages 455, 456): "It is evident that, if decedent makes such a testamentary disposition of his real estate as to convert it into personalty, the shares of the legatees under such a will are liable." Satisfactory as his reasons for so holding may have been to him, although they are not disclosed in his opinion, diligent search does not disclose that they have been followed by any other court. Since the publication of that decision the question seems to be necessarily decided by the decision of the Court of Appeals in *Matter of Hoffman*, 143 N. Y. 327. This last case calls our attention very sharply to section 22 of the act (Laws 1892, chap. 399), which reads: "The words 'estate' and 'property,' as used in this act, shall be taken to mean the property or interest therein of the testator . . . specifically exempted from the provisions of this act, and not as the property or interest therein passing or transferred to individual legatees."

The property of the testatrix sought to be reached was real estate, which by section 2 is exempt in this case. Even if it be converted and be distributed as personalty, "the property or interest therein of the testator" was realty. The conversion does not occur until after the death, and until after the decedent parts with all "estate" and "property."

It might also be remarked that grave doubt would exist if it ever entered the minds of the legislators by whom this act was passed, when they sought to exempt real estate from the operation of the act, that such things as equitable conversions existed; still, less, that the courts would attempt to insert them in the act.

The purposes and theory of the exemption of real estate from the tax are apparent. Personalty is ordinarily easily converted, and can, therefore, easily respond to such a tax without special hardship. On the other hand, real estate generally is slow of sale, and its conversion is a matter of time and opportunity. A

tax on real estate would inevitably work hardships and sacrifice. For it must be borne in mind that the act applies to the remotest rural district as well as to the metropolitan centers. While it might be an easy matter to raise money in the latter on real estate, it is frequently and almost invariably a matter of difficulty, and not infrequently an impossibility, to do so in the former.

The fact that probably ninety per cent. of the devises of real estate are to the classes exempt by section 2 of the act would make it all the more evident that the intent of the legislature was to altogether exempt real estate, except as to collaterals, conversion or no conversion.

James M. Hunt, for appellant; Leonard A. Bradley, for respondents.

SILKMAN, S.—The appraiser in this matter has given the question raised by the appellant careful consideration, and has aided the court with a very well-considered opinion, and the conclusion that there was no equitable conversion intended by decedent is correct.

Appeal dismissed on the opinion of the appraiser, with \$10 costs, to be paid by the county treasurer.

In the Matter of Appraisal of the Estate of SOPHIA GAGE BURR,
Deceased.

(Surrogate's Court, Westchester County, Filed October, 1895.)

1. TRANSFER TAX—NON-RESIDENT DECEDENTS.

Moneys of a non-resident decedent which are deposited in savings banks in this State, or which are in the hands of his attorney here, are subject to the transfer tax.

2. SAME—SITUS OF PERSONAL PROPERTY.

The doctrine that personal property follows the person of its owner does not apply where the securities representing such property or documentary evidence thereof are within this State.

Appeal from a decree rendered on the report of the appraiser.

James M. Hunt, for appellant; J. Hampden Dougherty, for respondent.

SILKMAN, S.—This is an appeal by the county treasurer from the report of the appraiser appointed by this court to value the property of decedent within this State for the purpose of taxation under chapter 399 of the Laws of 1892.

Decedent died in January, 1895, a resident of West Chester, in the State of Pennsylvania, in which State her will was proved and principal administration had. Her husband, Rushton D. Burr, died in Germany in May, 1893, but was at the time of his death a resident of the State of Massachusetts. By his will he gave his property to his wife. Among his assets were certain funds deposited in savings banks located in the cities of New York and Yonkers. After his death, and in the year 1894, Mrs. Burr transferred such bank accounts to her individual name. It does not appear by the evidence that she used these accounts by depositing and drawing money, but counsel for respondent upon the argument conceded that she did. These accounts at the time of her death aggregated \$8,584.73. Decedent also had in the hands of Duncan Smith, her legal adviser, who resides in this county, the sum of \$2,500, and had also a bond for \$10,000, secured by a mortgage upon real estate in the city of New York.

The appraiser finds that the decedent made and retained the savings bank deposits "merely for her temporary convenience, and with the intention of withdrawing the same therefrom as soon as she could find a satisfactory investment therefor; that in making such deposits she never intended to invest the said moneys within this State." But there is nothing in the record before me that justifies or sustains such a finding or conclusion.

The fact that her legal adviser resided in this State, as well as both of her executors, and the fact that she had already made investments in this State, would lead to the opposite conclusion.

The appraiser finds that only the bond for \$10,000, secured by a mortgage upon New York City real estate, is taxable in this State, while the county treasurer claims that the savings bank deposits and the money in the attorney's hands is also taxable.

I cannot see upon what principle the bond and mortgage is taxable, and not the savings bank deposits and the money in the hands of the attorney. I should be inclined to the opinion that, the property being intangible, its situs was that of the domicile of the owner, were it not for the decision of the Court of Appeals in *Matter of Romaine*, 127 N. Y. 80, in which case it was held that deposits in savings banks of this State, made by non-residents, were taxable here.

Counsel for respondent undertook to distinguish the *Romaine* case from the one at bar, upon the ground that it appeared in the *Romaine* case the securities were "habitually kept" within the State, and that in the case at bar the funds were left on deposit in this State temporarily only, awaiting investment.

The principle upon which such property is taxable is that it is under the protection of our laws and should, on that account, pay a share of the expenses of the government. The money in the savings banks was there drawing interest, and protected by the laws of the State; among others that creating a banking department, which department is carried on at a great expense to the State, and was enacted for the particular protection of depositors. It is only in cases of property actually or constructively in transit from one State to another through this State that an exception is made, and the property is not considered to be within the State.

This case is one of some hardship, for the reason that the whole estate of the decedent is taxable in Pennsylvania (*Laws of Pennsylvania 1887*, p. 79), and if the property referred to is taxable here, the right of succession to it will cost ten per cent. of its value.

The Pennsylvania statute was evidently passed in view of the

decisions in Orcutt's Appeal, 97 Pa. St. 179; Appeal of Commonwealth of Pennsylvania, 11 Wkly. Notes Cas. 492, which followed decisions in the United States Supreme Court upholding in effect the legal fiction or maxim, "*Mobilia personam sequuntur*;" but it was not long ago decided in this State that such fiction was not of universal application, and does not apply to laws relating to taxation. *Hoyt v. Commissioners of Taxes*, 23 N. Y. 228.

Judge Comstock, however, in the decision in that case, limited its application to personal property that was visible and tangible; but the logic of the decision in the Romaine case is that the maxim does not apply in any case where the securities representing the property or documentary evidence of property are within the State.

It is unfortunate that the laws of the different states relating to succession taxes are not uniform, and framed to prevent double taxation; and it is also unfortunate that a construction of the law should be given which makes it easy for the law to be evaded, as it could have been in this case. The foreign executors could have disposed of all the property within this State, and have given good title by assignment thereto, although they would not have any standing in the courts of this State to sue for the same. But with misfortunes we have nothing to do. We must execute the law as we find it, and as it has been interpreted by the higher courts.

The decree assessing the tax heretofore entered will be opened and modified to include all the property referred to in the appraiser's report, with ten dollars costs to the appellant.

Ordered accordingly.

In the Matter of the Estate of JOSEPH P. QUINN, Deceased.

(Surrogate's Court, New York County, Filed October, 1895.)

1. EXECUTORS—ACCOUNTING—ATTORNEY'S FEES.

An allowance for fees paid to an attorney by the executor or administrator cannot be allowed unless it is shown that the attorney's services were necessary and were actually rendered, and the amount paid for them was reasonable with reference to their character and importance and the result to the estate.

2. SAME.

The executor cannot be allowed for payments made to an attorney for services which the executor should have attended to personally.

Motion to confirm referee's report.

Burr & Coombs, for plaintiff; R. & E. J. O'Gorman, for testamentary trustee.

ARNOLD, S.—This is an accounting by a testamentary trustee. Upon objections filed a reference was ordered. Upon the hearing proof was made as to one item which had been objected to and the objection was withdrawn, and as to another contested item it was admitted that it should be allowed. As to all the other items excepted to, it was conceded by the accountant that the objections should be sustained with the exception of certain payments claimed to have been made to counsel for legal services. As to these the contest proceeded and the referee has allowed them to the accountant. Exceptions to such allowances were duly filed and are now insisted on. No bills for the alleged services were ever rendered to the trustee, nor is there any competent evidence of any of the details of the work done, and there are no vouchers for the payments produced except certain checks, which are drawn to the order of and indorsed and appear to have been collected by these attorneys, or one of them. Their aggregate is much larger than the amount which the accountant asks to be allowed to her here, but this is sought to be ex-

plained by her statement that the services were in respect to three trust estates, and that she charged to this one only one-third of the whole. The attorney who seems to have collected this money died before the petition was filed herein, and there is evidence produced showing that he died insolvent. An executor, trustee or other accounting party may be allowed upon such accounting "for his actual necessary expenses as appears just and reasonable." Section 2730, Code. Under the sanction of this provision allowance is made for payments to counsel for their services by the accountant, but that class of "expenses" is entitled to no immunity from the inflexible rule that all disbursements which reduce the amount to be distributed to those interested in the estate must be shown to have been necessary to the proper administration of such estate, must be shown to have been actually rendered, and it must be further shown that the amount paid for them was reasonable according to their character and importance, and, it may now be said, with reference to the results obtained. *Randall v. Packard*, 142 N. Y. 47.

As above stated, no details of the services for which the contested payments were here made are furnished. It is shown that the trust estate embraced certain houses in this city; that the trustee did not live here; that she was inexperienced in business matters; that she did not, and, she claims, under the circumstances could not, be expected to personally take charge of these buildings; that she employed an agent to look after them, collect rents, etc.; that orders were made by the Board of Health which required this agent to see her attorney frequently; that she made payments to the trust beneficiaries through the latter, and that she sought his professional advice repeatedly; but all this is mere generalization, no proof of the value of the services given, no dates furnished, no particulars of the time spent, of the labor performed, nothing from which any court can put a value upon the work and say it is just and reasonable, or in fact upon which any professional witness could fairly predicate any opinion as to the actual work done,

its necessity, its results, or its value. The trustee is, no doubt, situated unfortunately; her attorney is dead, and she can produce no bills or vouchers except these checks, which do not give any information upon their face as to what they were given for; but this state of affairs does not relieve her from the usual burdens on an accounting. Again, much of the work which she claims was performed by counsel, such as payments to beneficiaries, looking after the agent of the property, etc., was just such work as it was her duty personally to perform, and for which she is allowed commissions. If unable or unwilling to perform those duties she should have resigned her office. The exceptions to the referee's report are sustained. In view of the fact that objections were taken which had to be withdrawn, as well as in consideration of the apparent good faith of the trustee in her conduct of the administration, even in respect to her dealings with counsel which have been here criticized, she should not be charged personally with costs.

Exceptions sustained.

In the Matter of the Will of JAMES A. CAREY, Deceased.

(Surrogate's Court, Oneida County, Filed November, 1895.)

1. WILL—TESTAMENTARY CAPACITY.

One who is able to comprehend his act, understands the nature and extent of his property and knows the persons who are the subjects of his bounty, has testamentary capacity.

2. SAME—EXECUTION.

A substantial compliance with the statutory requirements is sufficient.

3. SAME—WITNESSES.

It is not absolutely necessary that the witnesses be together when they attest the will.

4. SAME—PROBATE.

A will may be admitted to probate against the evidence of the subscribing witnesses; or where, by reason of want of recollection, they cannot make the proofs prescribed by law.

Application for the probate of the will of James A. Carey, deceased. Decedent's daughter filed objections to its probate on the ground that it was not properly executed.

Smith M. Lindsley, for petitioner; Charles H. Searle, for contestant.

CALDER, S.—James A. Carey died on the 18th day of April, 1890, leaving the instrument here offered for probate, dated the 8th day of March, 1889. The petitioner and contestant herein are his daughters.

No allegations of mental incapacity or undue influence are alleged in the objections, but some evidence was given tending to cast some reflection upon the executive ability of the decedent in certain transactions; but a careful examination of the evidence given by persons who had known him for many years shows that he was a man of much ability, and seemed well versed in the requirements of the statute in reference to the execution of deeds, mortgages and instruments of a similar character. There was some impairment of his hearing, but not so as to seriously affect him at the time of the execution of the will. It must, therefore, be conceded that he was capable mentally to comprehend the act he did, understood the nature and extent of his property, knew the persons who were the subjects of his bounty, and was unrestrained in the testamentary disposition of his estate.

The objections strenuously urged on behalf of the contestant are that there were fatal defects in the execution of this instrument, and that certain statutory requirements were disregarded. It is insisted that the instrument was not subscribed by the testator in the presence of each of the witnesses; that it was not

acknowledged to each of them, and that the signature was not exhibited to them; that the testator did not request them to sign the will; that they did not sign the same at his request; and that the same was not executed, published, acknowledged and declared by said testator to be his last will and testament.

The statute provides that every last will and testament of real and personal property shall be executed and attested as follows: (1) It shall be subscribed by the testator at the end of the will; (2) such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses; (3) the testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament; (4) there shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator.

The omission to observe any of these requirements is fatal to the execution of an instrument testamentary in character.

It is not necessary that each requirement of the statute be followed separately, or that its exact words be employed, or that its construction be interpreted in a literal sense; for such an interpretation would in many instances defeat a testator's express direction, and deprive one of participating in another's intended benefaction. Few witnesses can recall perfectly or describe minutely the exact transaction at the execution of a will; and a long line of cases, unnecessary here to discuss, hold that a will is properly executed if there be a substantial compliance with the requirements of the statute.

The will is holographic, and written upon a half sheet of foolscap paper, the signature being about two inches from the bottom of the page. The attestation clause begins upon the line immediately below the signature, and is continued upon the reverse side of the sheet, the names of the witnesses appearing immediately at the end of said clause. The witnesses, W. Byron

Topping and George B. Northrup, were friends of the deceased, and had known him for upwards of twenty years.

It appears that, upon the day the will bears date, testator went to the store of Northrup, in the village of Deansboro, having with him a book, which he opened upon a table before him, sat down, and began to write in Topping's presence. When he had finished, he asked Topping where Northrup was; said he was going west, and was making a will, as he did not know what might happen before he got back. Northrup was not present. Carey signed the will in the presence of Topping, acknowledged the signature to be his, said it was his will, and requested him to sign as a witness, which he did in the presence of the testator. Northrup then appeared, and, according to Topping's evidence, testator spoke about going west, and said he had made his will, and asked Northrup to sign as a witness. Topping then said to Northrup: "It is his will; I have witnessed it, and he wants you to witness it." Northrup sat down to write, took the paper in his hands, saying, "We ought to know how many sheets there are," and then made the remark, "There is one," and signed it at the end of the attestation clause.

The following question was asked Topping by counsel for the proponent: "Q. You said to Mr. Northrup, in Carey's presence, that the instrument there was the will of Mr. Carey, and that Mr. Carey had so declared it, and had requested you and Northrup to sign the same as witnesses. You said that, didn't you? A. Yes, sir."

Topping further testified that he does not think Northrup saw the signature of Carey, although he would not be positive. According to Northrup's evidence he signed the paper that Carey handed him in the presence of Carey and Topping; that Carey did not say it was his will, but that he asked him to witness a paper; that Topping told him when he was signing that it was the will of Carey; that the testator did not sign the same in his presence, or exhibit his signature.

The subscribing witnesses were examined at length by the respective counsel, and in deciding this controversy I have endeavored to give it the careful consideration which its importance demands. When Topping said to Northrup, "It is his will; I have witnessed it, and he wants you to witness it," it must be presumed from the evidence that Topping acted in behalf of the testator; and when so acting, it is of the same legal effect as though Carey had spoken the words himself. *Gilbert v. Knox*, 52 N. Y. 125; *Peck v. Cary*, 27 N. Y. 9.

There can be no contention but that Topping and Carey, as far as their transaction was concerned, fully complied with the requirements of the statute; and Northrup's evidence, taken in connection with that of Topping, impresses me strongly that there was a proper execution of the instrument by Carey in Northrup's presence, and Northrup so attested.

Topping is in doubt whether Northrup saw the testator's signature, and Northrup testifies that he did not see the same; but taking the evidence in its entirety, and taking into consideration all the circumstances surrounding the execution of this instrument, I believe the testator exhibited this instrument, and acknowledged his signature to Northrup, making known to him that it was his will and testament, which was signed by said witness, all of which was done in such a manner as to be a proper observance of the requisite legal formalities, and in conformity with numerous decisions of our courts.

The attestation clause is full and complete, being in the handwriting of the decedent, and it would be almost preposterous that a man who seemed to understand the statutory requirements would fail to observe them after he had carefully written them.

Northrup testifies that the attestation clause was not read to him, and that he did not read it; yet he knew the nature of the instrument he was attesting. It cannot be possible that a man possessing the executive ability and business experience that he

apparently had should attach his name as a witness to the will of another, when he did not know the will had actually been signed by the testator. The recollection of the witnesses must be faulty. This I believe to be the case, without intending to cast any reflection whatever upon the credibility of said witnesses.

The testimony of the subscribing witnesses is generally given great weight, but it is not conclusive. Otherwise the validity of instruments involving the disposition of large estates would often rest upon a treacherous memory, or volition of witnesses to testify. To guard against such a condition, the statute has prescribed and the courts have decided that a will may be admitted to probate against the evidence of the subscribing witnesses, or where, by reason of want of recollection, they are unable to make the proofs as prescribed by law. Code, sec. 2620; *Orser v. Orser*, 24 N. Y. 52; *In re Merriam*, 42 St. Rep. 619; *In re Cottrell*, 94 N. Y. 329; *In re Hunt*, 110 id. 281; *In re Nelson*, 141 N. Y. 152. The fact that the two subscribing witnesses were not together when they attested this instrument is immaterial. *Hoysradt v. Kingman*, 22 N. Y. 372; *Willis v. Mott*, 36 id. 497. The attestation clause is full and complete, reciting all the formalities required by statute, and it must have some bearing upon the question in controversy. *In re Cottrell*, 95 N. Y. 335; *In re Hunt*, 110 id. 282; *In re Nelson*, 141 N. Y. 152. Careful attention has been given to the numerous cases cited by the learned counsel for the contestant, and this decision is not in conflict with them. In those cases some act which the statute required was omitted, so as to cause a fatal defect in the execution. The law is applicable to the facts found in each case. In the present case, taking into consideration the entire evidence, the manifest intention of the testator to execute a will, and all the circumstances surrounding this transaction, no requirement was disregarded, and a valid and complete execution of this instrument must have been performed.

A decree may therefore be entered admitting said will to probate.

Decreed accordingly.

Note.—Affirmed by Appellate Division, 24 App. Div. 531.

In the Matter of the Probate of the Will of JOSEPHINE M. LYMAN, Deceased.

(Surrogate's Court, Richmond County, Filed November, 1895.)

1. WILL—PROBATE—ESTOPPEL.

Decedent left two wills, by the first of which she gave her husband a life estate in realty and by the second gave him the fee. He procured the probate of the first and recognized the rights of the remainderman until his death. *Held*, that he and those claiming under him were estopped by his acts from setting up and proving the second will.

2. SAME—EXECUTION.

Proof that testatrix gave an affirmative sign in answer to a question whether she asked the witnesses to sign is insufficient to prove such request where it appears that she was under the influence of opium at the time.

Application for the probate of a will.

James L. Bennett, for proponent; Amasa A. Redfield, for contestant.

STEPHENS, S.—Josephine M. Lyman died at the city of Philadelphia, in the State of Pennsylvania, on the 27th day of December, 1874. She left her surviving her husband, William H. Lyman, now deceased, and her daughter, Josephine, the contestant in this proceeding. In the month preceding her death the decedent executed two wills, both in the handwriting of her

husband, one bearing date the 14th, and the other the 20th, day of November, 1874.

By the first will she devised (together with her personal property) all her real property, specifically describing three parcels, situated, respectively, in Philadelphia, Pa., in Newark, N. J., and in Richmond county, N. Y., to her husband, William H. Lyman, in trust for her daughter, Anna Josephine Lyman (now Mrs. Nicholas, the contestant), "with full power to sell and convey the same, or any part thereof, and invest the proceeds in such property or securities in his name, as trustee, as he shall deem best for the estate; the said estate not to be delivered up to my daughter during the natural life of my husband, the trustee above named; and I desire all increase in my estate, and all income, over and above the living and other necessary expenses of my husband and daughter, to be invested as my said trustee shall see best for the interest of said estate. On the death of my husband, all my property vested in him as trustee shall become absolutely the property of my said daughter Josephine."

By the second will she devised all her property to her husband, the said William H. Lyman, absolutely.

It is not open to question that, under the statutes of this State, the fee of the Richmond county property was, by the first will, vested in the daughter, Josephine, subject only to be divested by a sale under the power conferred on the trustee, and to the partial interest of the husband in the rents, issues, and profits during his life.

This will was, upon the petition of said William H. Lyman, duly admitted to probate in the office of the register of wills in the city and county of Philadelphia on the 7th day of January, 1875, and letters testamentary were on the same day issued to him, and thereafter he caused an exemplified copy of the same to be filed in the office of the surrogate of the county of Essex, N. J., and also in the office of the surrogate of the county of Richmond, N. Y. He immediately entered into possession of

the property passing under said will, and from the date of the probate of the same until the date of his death, which occurred on the 8th day of August, 1893, he was, as executor and trustee, in receipt of the rents, issues and profits thereof, and applied them, under the terms of this will, to the use of himself and his daughter; and, in addition to this, he exercised the power of sale conferred upon him by this will. It also appears from the evidence that on one occasion said William H. Lyman asked his daughter to unite with him in giving a mortgage upon the Newark property, which she did, in the presence of Minnie D. Lyman, the proponent of the will now in question, and that subsequently the said Minnie D. Lyman asked her to give her a mortgage upon her (the daughter's) reversionary interest in the Staten Island property to secure her for money loaned to William H. Lyman.

On the 26th day of April, 1882, William H. Lyman married Minnie Duke, the proponent herein. She was his third wife. He died on the 8th day of August, 1893, leaving a last will and testament, which was duly admitted to probate in the office of the surrogate of the city and county of New York on the 28th day of November, 1894; and on the same day letters testamentary were issued to Minnie Duke Lyman, the executrix named herein. In and by said will he gave to his wife, Minnie D. Lyman, all of his property, of any kind whatsoever, that he may own at the time of his death.

On the 22d day of September, 1893, the said Minnie D. Lyman filed with the register of wills in the city of Philadelphia a petition to set aside the probate of the will of Josephine M. Lyman, proved on the 7th day of January, 1875, and for the probate of the will of said Josephine M. Lyman, dated the 20th day of November, 1874; and on November 6th, 1893, after hearing the testimony of the witnesses and the argument of counsel, it was ordered and decreed by the register that the said petition be dismissed.

On the 28th day of December, 1893, the said Minnie D. Lyman filed in this court a petition for the probate of said will of said Josephine M. Lyman, dated the 20th day of November, 1874.

There are two matters to be determined in this proceeding:

(1) Is the proponent equitably estopped from the right to invoke the interference of this court in admitting this will to probate or not? If not,

(2) Has the factum of the will been proved to the satisfaction of the court?

First. It must be remembered that William H. Lyman drew both wills, a period of only six days intervening between them, and that both were in his possession at the time of the death of his wife, Josephine M. Lyman; that he elected to cause to be admitted to probate the one bearing date the 14th day of November, 1874, and qualified as executor and trustee thereunder; and that he proceeded to and continued to administer the estate under said will until the time of his death; that he never showed this paper either to his daughter or to his subsequently wedded wife, the present proponent; that she (the proponent) never saw it until after his death, when she found it in a bundle of papers which he handed her a short while before his death; and that she found two wills together in the same bundle. At the time of the death of Josephine M. Lyman, her husband was the one most interested in her estate. He had both wills in his possession. He was the executor named in both, and it was in his power to offer for probate whichever he saw fit. He chose to accept the less estate rather than the greater. Why should he not be bound by his election? It was his own free act and deed. There was no coercion about it. It was entirely voluntary on his part. Then why, it may be asked, did he elect to take a life estate only, when he could as readily have taken an absolute estate? The reason is made plain by the testimony of the proponent herself, who says he had mentioned the fact of a last will, but said he was afraid to probate it, lest a prior wife, from

whom he was divorced, might claim an interest in the property.

It is claimed on the part of the proponent that there is no election here, and that, even though there were, no forfeiture follows, but simply a question of compensation, and also that there is no estoppel, for the reason that there was no inconsistency in the act of Mr. Lyman, because there was nothing that he did under the prior will that he could not have done under the later will, and whatever was done by him in no wise prejudiced the contestant.

Whatever the rights of the proponent are in this proceeding, they are derived through and under William H. Lyman, so that she stands before the court in precisely the same position that he would, had he instituted it in his lifetime. By his acts during life he surrendered and released the estate of inheritance purporting to have been given by the paper now propounded, and elected, instead thereof, to accept, and did, as a matter of fact, accept, a lesser estate, under another instrument. Moreover, it is in evidence that repeated representations were made by him to his daughter, the contestant, that the fee of the real property was in her, and that, relying upon these representations, she obligated herself personally for \$3,800 for his benefit, and secured the obligation by a mortgage upon a portion of the real property devised to her by the will which it is now sought to overthrow.

It is a well-settled principle of equity that when a party has, by his declaration or representation, induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of his declaration, if the consequence would be to work an injury to such other person. See *Matter of Rusko*, 34 Hun, 334, and cases cited. The proponent seeks to take this case out of the operation of that principle by showing that the mortgaged premises were worth at least the amount of the bond and mortgage, and consequently the contestant was not injured. This is not an answer to the contention of the contestant. The mere likelihood that there will be no pecuniary loss does not

take away from Mr. Lyman's conduct its effect of an equitable estoppel.

The case of *Bates v. Gillett*, 132 Ill. 287, would seem to have a direct application. The plaintiff, who claimed to have an interest in the lands in question, had held himself out to be the guardian of certain infants, under the will of their grandfather. For twenty years he managed their property, dealt with it, and leased it in his name, as guardian. During all that time the children had understood that they were the owners, deriving their title under the will mentioned, and not until after they had contracted to convey a good title did the plaintiff assert his claim. The court said "that it would be grossly inequitable to now permit the assertion of title by the complainant. At least, he does not come into equity with conscience, good faith and reasonable diligence. His delay is wholly unexplained, and it must be held that his acquiescence for the length of time indicated amounts in equity to a complete bar to the relief sought by complainant's bill."

In *Foote v. Foote*, 61 Mich. 181, it was held that when fourteen years have elapsed since the death of the testator, the will being notoriously in existence, and accessible throughout that time, it is too late for one of the heirs, who had agreed to another scheme of distribution, to prove the will, and claim benefits under it inconsistent with his former agreement. A second will is only provable upon an allegation that it has been discovered since the probate of the first will, and that by it other persons besides those who took under the first will are entitled to some share of the estate.

In the case at bar the will now propounded was never lost or mislaid, and was not discovered, because it was in the possession of Mr. Lyman, the sole beneficiary, or under his control, from the time of its execution until the day of his death, a period of almost nineteen years. If, therefore, Mr. Lyman would have been estopped, the present proponent, claiming no more rights than he had, is now subjected to the same principle of equity.

Second. The *factum* of the paper now propounded having been put in issue by the answer of the contestant, it is not alone sufficient that the formal execution and publication of the same be shown; but the questions whether the testator intended to make the particular will now offered for probate, whether it conformed to her real wish, and whether in fact this particular instrument is her will, are all elements of the *factum* of the will, which are to be determined by a considerate examination of all the facts and circumstances attending the transaction.

This will was witnessed by Joseph M. Cowell and Herbert H. Brower. Joseph M. Cowell died before the same was offered for probate, leaving Herbert H. Brower not only the sole surviving witness of the same, but also the only person living who was in the room at the time it was executed. He testified that previous to the execution of this will the testatrix, who was his sister, "made a remark to me that her husband was not quite satisfied with the other will that was made, and she would have to make another. Q. Did you have any conversation with her with reference to Josie (her daughter, the contestant) on the subject of the will? A. I made the remark to her that I thought Josie ought to be taken care of and looked out for. Q. What did she say, if anything? A. She made no reply at that time, but after this will was executed she said that Josie would have to take her chances with the rest of the world."

All this was said within six days from the time that testatrix had made, while on her deathbed, the most natural and just will for any mother, leaving a husband and only child twelve years old, to make.

The circumstances surrounding the execution and publication of the will were these: The will is in the handwriting of William H. Lyman. Mr. Lyman called the witness Brower into the room. The witness Cowell finally came into the room. He had been informed what he came in for by Mr. Lyman. Mr. Lyman then took the paper out of his pocket and read it over. Then, together with Mr. Brower and Mr. Brower's father,

who was present, he bolstered his wife up in bed. He then put a pen in Mrs. Lyman's fingers, and held the ink bottle in his hand. After the paper was signed he took it away from her, and passed it over to the witnesses to sign. After they had signed it was passed back to Mr. Lyman. The witness Brower testified that the testatrix signified her acceptance of the will, and when asked how she did this, other than by putting her name to it, he replied, "By Mr. Lyman asking her if that was her last will, in reply to which she bowed her head;" and also, in reply to a question, that she said nothing to the witnesses specially. This is the testimony as to the execution and publication of the will by the only living witness. This witness also testified on his direct examination, in answer to the question whether, at the time she executed the instrument, she was in her right mind, that "she appeared to be. She was more or less under the influence of stimulants to quiet her pain." And on cross-examination he said he meant by stimulants "opium suppositories." In answer to the question, "Do you know whether or not she was under the influence of these opiates at the time she executed this will?" he testified, "In my opinion, no more than she was at any other time." And to the question, "She was as much under the influence of opium then as she was at any other time?" he testified, "I think so."

The contestant testified that she was in the house in Philadelphia where this will was executed; that for some time previous, and continuously until the time of her death, opium suppositories were administered to her mother, the testatrix, and in addition thereto a solution of morphine alternately every two hours; and that the effect of these opiates upon her was, "They always clouded her," and "seemed to produce a sort of stupor."

With these facts confronting it, the court is asked to hold that the *factum* of the will has been proved, and that the same be admitted to probate. Leaving out of consideration the question of undue influence, as well as the testamentary capacity of the decedent, the most that could be claimed by the propo-

ment is the presumption that the statutory formalities in the execution, publication and attestation of the paper now propounded were complied with. Such a presumption may arise, and the court be justified in concluding that every essential requirement was complied with, as witness the case of the testator, the late Homer A. Nelson, 141 N. Y. 152; but whether such a presumption arises in any particular case depends upon the facts of that case. In the case at bar I cannot do otherwise than find that there is not only an utter failure of direct proof to establish the statutory formality of a request by the decedent to the witnesses to sign their names as such, but that, on the contrary, the testimony forbids the finding of any presumption that there was such a request.

The petition must be dismissed.

Decreed accordingly.

In the Matter of the Judicial Settlement of the Estate of
HANNAH P. FOSTER, Deceased.

(Surrogate's Court, Orange County, Filed December, 1895.)

1. EXECUTORS—LEGACY—SET-OFF.

A debt due to the estate from a legatee may be set off against the legacy, although such debt is barred by the statute of limitations.

2. WILL—LEGACY.

In the absence of language in the will, or extrinsic proof, showing such an intention, the fact that a legacy was given to a debtor does not release or extinguish the debt.

Upon the settlement of this estate the contestants claim that the executor should be charged with the amount of a certain note made by Albertus A. Foster to his mother, the testatrix, and held by her at the time of her decease, for \$150, with inter-

est thereon from July 15, 1882, and that said executor should not be credited in his account with his legacy of \$200, bequeathed to said Albertus A. Foster, and paid to him by said executor, but that said legacy should have been credited and applied *pro tanto* upon said note.

B. V. Wolf, for executor; Dill & Cox, for contestants.

McELROY, Special Surrogate.—The note above mentioned was made July 15, 1882, payable one day after date, with interest.

On the 19th day of July, 1889, the testatrix made her will, whereby she bequeathed to her son, Albertus A. Foster, the sum of \$200. At this time more than six years had elapsed since the making of this note, and no interest, or any part of the principal of said note, had been paid.

Under Schedule B of the account filed, the executor credits himself with the following item:

“Promissory note of Albertus A. Foster, by limitation of law not collectible, \$150.”

Under Schedule G of said account the executor also credits himself with the following item:

“Paid legacy to Albertus A. Foster, \$200.”

The executor contends:

(1) That, the statute of limitations having run against the note, the executor could not apply the legacy of \$200, or so much thereof as might be necessary to pay said note.

(2) That by the provisions of said will the legacy of \$200 was intended to be in addition to any indebtedness her son Albertus A. Foster might owe her.

The statute of limitations only affects the legal remedy, and in no case operates as a discharge or satisfaction of a debt. It does not even raise a presumption of payment, but is merely a bar to the remedy by action. That an executor has an equitable lien upon and a right to retain out of a legacy an amount due

from the legatee to the testator, and that this right is unaffected by the fact that such debt is barred by the statute of limitations, is well established. *Rogers v. Murdock*, 45 Hun, 30, and cases cited.

The testatrix, by her will, disposes of the greater part of her household furniture, beds, bedding, etc., by specific legacies, and the eighth clause of her will is as follows:

"Eighth. I order, direct and empower my executor herein-after named to sell, as soon after my death as he shall deem it advantageous to my estate, all the rest and remainder of my personal property and estate, and all my real estate of which I may die seized, at public or private sale, at his direction, and convert the same into money; and I give, devise and bequeath the proceeds of the sale of said real and personal property as follows:

"To my son John S. Foster, the sum of one hundred dollars (\$100).

"To my son Albertus A. Foster, the sum of two hundred dollars (\$200).

"To my husband, George A. Foster, all the rest, residue and remainder of the proceeds of the said sale of real and personal property and estate, for and during his natural life; and from and after his death I give, devise and bequeath the same to my own children, share and share alike. I order and direct my said executor, after making the said sale, and paying the legacies to John S. and Albertus A. Foster, to safely invest the balance of the proceeds of said sale, and keep the same safely invested for and during the natural life of my husband, George A. Foster, and pay the interest and income arising therefrom, after deducting legal expenses, to my said husband, George A. Foster, as soon as received."

The executor of this estate was directed to convert the personal property and estate, and all real estate, into money, from which was to be paid the legacies to John S. and Albertus A. Foster. The only question to determine now is, was this note

for \$150, made by Albertus A. Foster, an asset of this estate? A debt due the testator from one to whom he has given a legacy is an asset of the estate in the hands of the legatee, and is a satisfaction of the legacy to the extent of such asset. *Clarke v. Bogardus*, 12 Wend. 69; *Matter of Bogart*, 28 Hun, 468; *Rogers v. Murdock*, 45 id. 32; *Smith v. Murray*, 1 Dem. 34; *Matter of Colwell*, 15 St. Rep. 742.

When a creditor bequeaths a legacy to his debtor, and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after death the security for the debt is found, uncanceled, among the testator's property, the courts of equity do not consider the legacy to the debtor as necessarily, or even *prima facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release; and if such intention does not appear clearly expressed or implied on the face of the will, evidence from other sources will be proper. No evidence, however, was offered on the part of the executor upon this accounting, so we are obliged to determine the intention of the testatrix from her will; and after a careful examination of this will I fail to find expressed intention on the part of testatrix to give this legacy of \$200 to Albertus in addition to the debts he owed the testatrix. At the time she made her will this son, Albertus, owed the testatrix another note for \$25, which the account shows to have been collected by the executor, but no mention is made of either note in testatrix's will. While it is true that the testatrix, in plain language, directs that, from the proceeds of sale, John S. is to receive a legacy of \$100, and Albertus is to receive a legacy of \$200, and the balance is then to be invested for the use of her husband, it is equally true that nowhere in the will does the testatrix say, or even intimate, that in collecting the assets of her estate, and converting the same into money, this executor was not to consider this \$150 note as the law says it is, viz., an asset in the hands of the legatee.

In the case of *Smith v. Murray*, *supra*, Surrogate ROLLINS

says: "Nobody would contend that the mere gift of a legacy is of itself, and necessarily, a manifestation of an intent on the part of the testator to remit a debt due him from the legatee." *Smith v. Kearney*, 2 Barb. Ch. 533, 547-549; *Wright v. Austin*, 56 Barb. 17; *Close v. Van Husen*, 19 id. 509; *Rickets v. Livingston*, 2 Johns. Cas. 100.

I am therefore of the opinion that this executor should have applied this legacy of \$200 to Albertus A. Foster, or so much thereof as may be necessary, towards the payment of this note for \$150, and interest from July 15, 1882, to the date of the death of testatrix, and that the account should be amended and settlement made in accordance with the foregoing, and so order.

Decreed accordingly.

Note.—The liability of the decedent as indorser on a note may be set off against a claim of the maker of the note against the estate. (*Matter of Miller*, 23 Misc. Rep. 319.)

A note of a legatee may be set off against his legacy. (*Matter of Cramer*, 43 Misc. Rep. 494.)

In the Matter of Proving the Will of GEORGE VAN HOUTEN,
Deceased.

(*Surrogate's Court, Rockland County, Filed December, 1895.*)

1. WILL—PROBATE.

Where the attestation clause and surrounding circumstances satisfactorily establish the due execution of the instrument, it should be admitted to probate even against the testimony of the subscribing witnesses.

2. SAME—SIGNATURE.

It is not necessary that the witnesses should see the mark made by the pen, or its actual contact with the paper; it is sufficient that they see it in testator's hand and hear its scratching on the paper.

Probate of will.

Frank Comesky, for executors; Alonzo Wheeler and A. T. Fallon, for legatees; Garrett Z. Snider, for contestant.

TOMPKINS, S.—George Van Houten died, at the age of about eighty-four years, on the 15th day of August, 1895.

On the 7th day of May, 1895, he executed the will now offered for probate. On the 29th of May, 1895, the paper propounded as a codicil to the will purports to have been executed. No objection is made to the will, but the probate of the codicil is objected to on the ground that it was not executed in conformity with the statute.

The contestant alleges: First, that it has not been shown that the alleged codicil was subscribed by the testator in the presence of the attesting witnesses; second, that it does not appear that he acknowledged his subscription or execution in the presence of the attesting witnesses; third, that it has not been shown that the subscription was made in the presence of the attesting witnesses; fourth, that it does not appear that the testator declared the paper referred to as being the codicil of his last will and testament, and that it has not been shown that the testator, at the time of the alleged execution of the paper referred to, was of sound mind, or competent to make a will or codicil.

The last ground, viz., the incompetency of the testator, I understand, is not now urged; but the principal contention of the contestant's counsel is that the alleged codicil was not subscribed by the testator in the presence of the attesting witnesses, and that the testator did not acknowledge his signature, and did not declare the mark made by him to be his signature, and that the attesting witnesses did not see the signature made by the testator.

The signature of the testator upon the alleged codicil appears in the form of a cross mark between the Christian and surnames

of the testator, which were written by Mr. Huested, who prepared the will. The witnesses to this paper were Deuel and Ranson. The testimony of Deuel as to what occurred at the time of the execution of the paper is, in effect, as follows:

He, Huested and Ranson went into the room where the testator was sitting, together. Mr. Huested did some writing at a table in the room, and went to Mr. Van Houten and read what he had written. Mr. Huested held the pen and wrote the testator's name, and the testator held the penholder while Mr. Huested wrote. After the testator had hold of the pen in Mr. Huested's hand, Mr. Huested asked Mr. Van Houten if that was his last will and testament, or words to that effect. The testator answered by an affirmative nod of his head. Mr. Huested wrote the words "George Van Houten" opposite the seal upon the codicil. "I saw it in this way: I was sitting five feet from Mr. Van Houten. Mr. Huested had the paper and the pen and he did the writing while Mr. Van Houten held the pen. At that time I did not see what mark the pen made when Mr. Van Houten had his hand on it. I don't think I can swear whether the signature was made when Mr. Van Houten had his hand on the pen, or simply the cross mark. I am unable to say what mark or character of writing was made at the time Mr. Van Houten had his hand on the pen. At the time Mr. Van Houten had his hand on the pen I think the paper was on a book held by Mr. Huested in his left hand, and he held the pen in his right hand, and Mr. Van Houten put his hand on the holder of the pen; but what mark was made I did not see, and cannot swear to. I was looking at Mr. Van Houten when Mr. Huested held the pen. When I signed the paper I did not observe the mark there—did not look to see if it was there. I won't swear that, when I signed my name, that cross mark was there opposite the seal."

On the same subject the witness Ranson testified that: "Mr. Huested asked the testator if we [meaning himself and Deuel] would do as witnesses to the codicil, and Mr. Van Houten re-

plied, 'Yes.' Then Mr. Husted took the paper over to Mr. Van Houten, and took a book from a table, and placed it upon Mr. Van Houten's knees, and then Mr. Husted took the pen in his hands while I stood looking down on them. Then he asked him if he declared that to be his codicil to his last will and testament. He replied in the affirmative. Then Mr. Husted wrote, while Mr. Van Houten had hold of the pen. I cannot say what writing Mr. Husted did on this paper while Mr. Van Houten had the pen in his hands. I could not see the point of the pen. I could not see where the paper and pen came together."

The witness was not positive as to who signed first. While the testator had his hand on the penholder the pen made a scratching noise, as if its point had caught in the paper. This witness testified that, to the best of his knowledge, all of the writing above the signature of himself and Mr. Deuel, below the fold in the paper, was there at the time he signed his name.

"I saw his hand upon the pen, and the pen move as if making a mark, and I heard the pen scratch. I did not see the point of the pen. Mr. Van Houten's hand prevented it. I was about seven feet from him. The paper that I signed was the same paper that Mr. Van Houten wrote on. The paper was carried directly from the table to Mr. Van Houten. I saw Mr. Van Houten have the paper in his hands, and saw him place his hands or fingers upon the top of the pen, and saw the hand move over the paper, and heard the scratch made by the pen. I had no glasses on."

The witness' eyesight is poor, and while on the witness stand it was necessary for him to hold the paper from eight inches to a foot in front of his eyes in order to distinguish writing from the blank paper.

The substance of the testimony of both witnesses is that, while they did not see the mark actually made upon the paper, and did not have their attention called to the particular mark or writing placed upon the paper by Van Houten after it was made,

or before or while they were making their signatures, they, nevertheless, did see the testator's hand upon the pen, and the pen, guided by Mr. Huested, pass over the paper, and Mr. Ranson heard the scratching sound, and was only prevented from actually seeing the mark made by Mr. Van Houten's hand resting upon the pen. It was all done in one room, these four parties all being present, the witnesses being about seven feet from testator when the mark was made, and there was no other paper present than the one signed by the witnesses; and they signed the same paper which they saw the testator make some marks upon, and which was declared by him to be a codicil to his last will and testament in answer to Mr. Huested's question.

There appears upon the paper where the mark was made spattered ink, and indications of the point of the pen having caught in the paper while the mark was being made. This corroborates the testimony of Ranson, and the proponents claim that, at the time, in the presence of both witnesses, the mark was made by the testator. Certain it is that some mark was made by the testator upon the paper while the testator's hands or fingers were upon the penholder. No other mark appears anywhere upon the paper except that at the foot of the instrument, and immediately preceding the attestation clause, immediately after it was declared in the presence of both witnesses to be a codicil, etc., and they immediately signed their names at the foot of the same page upon which the mark appears.

The attestation clause is full and complete.

S. B. Huested, who drew the will and codicil, and who, while not a lawyer, had drawn a number of wills, and had had considerable experience in the execution of wills, testified fully and in detail as to what occurred and what was done at the time of the execution of the codicil. After he had prepared the paper and read it over, "paragraph by paragraph," to the testator, the following occurred:

"We three (meaning the witnesses and himself) went into the room. I introduced Mr. Deuel to Mr. Van Houten as the teacher. I then sat down to the table and wrote the testamentary

clause for the subscribing witnesses. Then I took a large book, and took it to Mr. Van Houten's chair, placing it before him, and wrote his name, and asked him to place his hand on the pen, and he took hold of the top of the pen, and I made the mark. I then went to the table, read over the testamentary clause to the witnesses, and they came to the table, and signed it there. After Mr. Van Houten had signed it, I asked him, 'You declare this paper to be your codicil to your last will and testament?' He said, 'I do.' And 'You request Mr. Ranson and Deuel to sign as witnesses?' And his answer was, 'Yes.' After that I read the subscribing clause for the witnesses, and they signed it in Mr. Van Houten's presence."

The following question was asked: "Q. Did he sign in their presence? A. He did."

I am satisfied that the statute was complied with, and that the paper was signed by the testator in the presence of the witnesses.

Where the attestation clause and the surrounding circumstances satisfactorily establish the due execution of the paper, it should be admitted to probate, even though it be in direct opposition to the testimony of both subscribing witnesses. *Trustees, etc., v. Calhoun*, 25 N. Y. 423; *Rugg v. Rugg*, 83 id. 592.

Here the attestation clause was complete, and stated all the formalities requisite to the due execution of the paper, and was read by Husted to them. The attestation clause is supported by the testimony of Husted.

I am convinced that the testimony of the subscribing witnesses, unsupported by any other fact or circumstance, would require the probate of the paper. From their testimony it was signed in their presence by the testator.

It would not be in accord with the meaning or spirit of the statute to hold that it was essential that the witnesses should actually witness the contact of the point of the pen and the paper in every case where the testator fails to acknowledge the signature as his signature.

The rule is that, unless the witnesses are present when the paper is subscribed, and witness the subscription, they must see the signature and hear it acknowledged by the testator to be his own signature.

In the cases cited by counsel for the contestant (*Sisters of Charity of St. Vincent de Paul v. Mary Kelly*, 67 N. Y. 409; *In re Simons' Will*, 9 N. Y. Supp. 352; *Woolley v. Woolley*, 95 N. Y. 231, and others), the witnesses did not see the testator make his signature, and probate was denied, either because the witnesses did not see the signature or have it acknowledged to be such by the testator; they are not applicable here, because I hold that the physical act of making the signature was done in the presence of both witnesses, and was seen by them within the meaning of the statute, although they did not see the mark.

I am satisfied that, when the witnesses saw Van Houten's hand upon the pen, and saw it move over the paper, and heard the scratching noise upon the paper, he (Van Houten) was in the act of making the mark which now appears at the foot of the instrument, and which stands for his signature. In the *Matter of Mackay*, 110 N. Y. 615, probate was refused because the signature was not made in the presence of the witnesses, nor did they see the testator's signature upon the paper, nor was any acknowledgment in respect to the subscription made by the testator.

The purpose of the statute and the several safeguards provided by it are to prevent perpetration of fraud.

The testimony of witnesses before me renders it perfectly clear that the paper upon which Van Houten held and moved the pen was the same paper which he declared to be a codicil, etc., and the same paper signed by them and now offered with the will for probate, and that the mark now appearing at its foot was then made by him.

With these facts so clearly appearing, no fraud can be accomplished by admitting the codicil to probate; but, on the con-

trary, great wrong would be done, and the testator's wishes and purposes would be thwarted if it was refused probate.

Motion of contestant denied.

Decreed accordingly.

In the Matter of the Estate of JOHN PLOPPER, Deceased.

(Surrogate's Court, Cattaraugus County, Filed December, 1895.)

1. EXECUTORS—SUBROGATION.

Where a widow, before her appointment as administratrix, pays a debt of her intestate out of her own property, she is entitled to be reimbursed from the estate, or from the proceeds of a sale of the realty, if the personal property is insufficient.

2. SALE OF REAL ESTATE.

A judicial settlement of the accounts of the executor or administrator is not a jurisdictional prerequisite to the institution of a proceeding to sell real estate for the payment of debts; but where there has been no settlement he assumes the burden of showing affirmatively the jurisdictional facts.

3. SAME.

Proof that the intestate had no personal property at his death is sufficient to make out a case for a sale of the realty for the payment of debts.

Application for leave to sell real estate for the payment of debts.

E. A. Nash, for petitioner; John Mosher, for contestants.

DAVIE, S.—John Plover died intestate, at the town of Leon, July 24, 1891, leaving him surviving his widow, but no descendants. He was the owner of the real estate described in the petition, consisting of a dwelling and small tract of land, of the value of \$600. The widow was appointed administratrix

on the 4th day of February, 1895, and thereafter filed her petition for a disposition of such real estate for the payment of the debts of the intestate. The funeral expenses, including the amount expended for a tombstone, were the sum of \$140. He was indebted, at the time of his decease, for medical attendance, to the amount of \$40; also upon a promissory note, given by him to one Snyder to secure a portion of the purchase price of the premises described in the petition. The widow made a small payment upon such note shortly prior to the death of the intestate, and after his death, and before her appointment as administratrix, paid the balance to Snyder; and the note was thereupon transferred to, and is now held by her, and she seeks to have the amount thereof established as an indebtedness of the intestate in her favor.

The contestants object to the making of a decree for the disposition of such real estate, asserting that the proof fails to show insufficiency of personal estate to satisfy such indebtedness, and that, the widow having voluntarily intervened and paid the indebtedness to Snyder, she is not a creditor of the estate, within the meaning and purview of the statute.

The evidence fails to show the particular circumstances under which the various payments were made by the widow to Snyder upon this note, nor is there any direct proof that such payment made prior to the death of the intestate was at his request; but it does satisfactorily appear that she paid the entire amount of such note from her individual property, and that, upon such payments being completed, Snyder delivered the note to her, and she presents the same, with proper proof of its execution by the intestate, as evidence of her demand against the estate. Had Snyder continued to hold such note there could, of course, have been no question of his right to have maintained this proceeding to enforce its collection from the real estate, in case of insufficiency of personal assets, nor could the right of the widow to resort to the same remedy have been questioned had the proof distinctly shown that she had purchased the note of Snyder;

but, having paid the note prior to her appointment as administratrix, it is claimed that such payment was entirely voluntary, and that she is not subrogated to the rights and remedies of the original creditor.

It is undoubtedly true that the doctrine of subrogation should only be applied when justice will be promoted thereby, and that one who is a mere volunteer may not invoke its aid. *Acer et al. v. Hotchkiss*, 97 N. Y. 395.

One who pays a debt for which he is not personally bound, and which is not a charge upon his property, is not entitled to be subrogated to a lien which the creditor had upon the estate of the debtor. *Wilkes et al. v. Harper et al.*, 1 N. Y. 586.

But the case at bar hardly calls for an application of the principle enunciated in the authorities cited. It is of but little consequence that the widow paid this indebtedness to Snyder before her appointment as administratrix, inasmuch as she was subsequently appointed, and seeks to maintain this proceeding in that capacity. The situation is simply this: The husband, in his lifetime, purchased the real estate in question, and gave a note to Snyder as part payment of the purchase price. The widow paid this note to Snyder. The contestants, who are distant and collateral relatives of the intestate, insist that she is not entitled to reimbursement out of the land, but that they, as the heirs-at-law of the intestate, are entitled to hold this real estate discharged from all obligations to make such reimbursement. The equitable features of such claim are not very apparent. It would result in great injustice to the widow to hold that she was to lose, and the contestants to gain, the benefit of this payment made by her.

In the case of *Ball v. Miller*, 17 How. Pr. 300, it was held that where, upon the judicial settlement of the accounts of an administrator, a balance was found due to the representative from the estate, such balance, so far as it consisted of, or was caused by, the application of the moneys of the estate to the payment of debts existing against the intestate in his lifetime,

should be satisfied out of the proceeds of the sale of real estate. Justice HOGEBROOM, in the opinion in this case, says: "So far as the excess in Mrs. Casey's expenditures as administratrix over her receipts is caused by the application of the moneys of the estate to the payment of debts existing against the intestate in his lifetime, I think she ought to be regarded as the equitable assignee of those claims, and to be subrogated to the rights of those creditors. This is a familiar principle in equity jurisprudence, and the Surrogate's Court partakes strongly of the characteristics of an equity tribunal. In equity, the payment of a claim does not always and necessarily extinguish it, but is deemed merged, extinguished and satisfied, or kept alive, according as equity and justice require. In this case there was no obligation on the part of the administratrix to make payments beyond the personal assets in her hands; and, if she made them, it must be deemed to have been done for the convenience of the creditor or for the benefit of the estate, and not to her own prejudice. To the extent that she has applied her own moneys or those of the estate upon the claims of creditors of the deceased, I think she must be regarded as the equitable assignee of those demands, and entitled to satisfy them out of the proceeds of the real estate, in the same manner as the original creditors; and such, I think, is the fair effect of the authorities." See opinion, page 305. And in this connection the court cites *Livingston v. Newkirk*, 3 Johns. Ch. 312, 318; *Evertson v. Tappen*, 5 id. 497, 514; *Gilchrist v. Rea*, 9 Paige, 66; *Collinson v. Owens*, 6 Gill & J. 4.

The case of *Ball v. Miller* is cited and recognized as authority in *Duntz v. Duntz*, 44 Barb. 461.

The only satisfactory conclusion which can be arrived at from a careful review of all the authorities, taking into consideration the obvious equities of the widow's claim, is that she should be permitted to recover, from the proceeds of the sale of the real estate, not only the funeral expenses paid by her,

but also the amount advanced by her to Snyder upon the note of the intestate.

In regard to the remaining proposition, that the evidence fails to show insufficient personal estate for the payment of these debts. The title to the real estate, upon the death of the owner intestate, vests immediately in his heirs; and it can be taken for the payment of debts only by virtue of the statute, and the statutory provision must be strictly followed. To justify a surrogate's decree directing the sale of real estate of which the intestate died seized for the payment of his debts, it must be made to appear that all the personal property of the decedent which could have been applied to the payment of the decedent's debts and funeral expenses has been so applied, or that the administrator has proceeded with reasonable diligence in converting the same into money, and applying it in such payments, and that it is insufficient for the payment of the same. *Kingsland v. Murray*, 133 N. Y. 170.

The judicial settlement of the accounts of the administrator was not a jurisdictional requirement before instituting this proceeding; but where no such settlement has been had, the administrator assumes the burden of showing affirmatively, as a part of her case, the facts required by section 2759 of the Code. *Matter of Howard's Estate*, 11 Misc. Rep. 230.

Then the question arises, does the evidence in this case satisfactorily show such insufficiency of personal assets?

The petition alleges that the intestate owned no personal property at the time of his death. It appears from the evidence that, for many years prior to his death, the intestate and the petitioner had resided upon a farm in the town of New Albion, and that such personal property as was upon the farm had been produced and raised upon or paid for out of the avails of the farm; that intestate originally contracted in his own name for the purchase of the farm, but being unable to meet the payments, the contract was foreclosed, and upon the sale under such foreclosure the petitioner became the purchaser; and that for many

years the title to such land was in the name of the petitioner. On the examination of the petitioner as a witness on her own behalf, she was asked the following question: "Did he (the intestate) own any personal property?" to which she replied, "I calculated we owned it together. He bought the mowing machine, rake and tools, and such things as were there." But, upon her further being interrogated as to the circumstances, it quite clearly appeared that such reply did not represent the actual situation. The intestate had no interest in the farm, nor does it appear that he had any interest in the avails thereof. He had for many years been lame, and to some extent unable to work. None of his individual funds had been invested in the purchase of the stock or tools upon the farm. In fact, the petitioner held the legal title to all the personal estate upon the farm. There is no pretense that the intestate was possessed of any personal estate aside from such personal property as was upon the farm at the time of his death, and I am clearly of the opinion that the evidence discloses that all of this property belonged absolutely to the petitioner individually. This being the case, it must be held that the petitioner has satisfactorily established all the requisite facts to entitle her to a decree in this matter.

Appraisers will accordingly be appointed, and, upon the filing of their report, a decree will be made for such disposition of the real estate as such report shows to be advisable.

Decreed accordingly.

In the Matter of the Petition for Revocation of Probate of the
Will of ANTOINE RUPPNER, Deceased.

(*Surrogate's Court, New York County, Filed December, 1895.*)

1. WILL—DETERMINATION OF VALIDITY—BAR.

A party to an action to determine the validity of a will, who appeared therein, is concluded by the judgment in favor of its validity, and cannot maintain an action to revoke its probate.

2. SAME—PARTIES.

The mere omission of necessary parties to such an action is not available to a party thereto for the purpose of attacking the judgment.

3. PROBATE—REVOCATION OF—PARTIES.

Where the petitioner is estopped or otherwise disqualified to maintain a proceeding for revocation of probate, an assenting respondent cannot be substituted in his place and allowed to continue the proceeding.

4. SAME—LIMITATION.

Where the issues of probate were tried by a jury, the statutory limitation of one year begins to run from the entry of the findings, and not from the time they were filed in the Surrogate's Court.

5. DISTRIBUTION—CONFLICT OF LAW.

The distribution of a decedent's personal estate is governed by the law of the decedent's domicile at the time of his death.

Proceeding for revocation of probate.

Isaac N. Miller, for petitioner; Lucius H. Canton, for proponent.

ARNOLD, S.—This is a proceeding for revocation of probate of the will of the decedent, under section 2647 of the Code. The sole petitioner is Barbara Ellensohn, the half-sister of the testator, and a person interested in his estate. All the parties entitled thereto under section 2649 have been duly cited herein, and all oppose the revocation except one Anna Kristof, an infant, who appears by guardian, and files an answer admitting the allegations of the petition in respect to the invalidity of the will. Upon the opening of the case, the respondents, with the

exception above stated, moved for a dismissal of the proceedings upon grounds set forth in their respective answers. These are—First, that the proceeding was not commenced within the period limited by section 2648 of the Code; second, that the petitioner is estopped from maintaining such proceeding by reason of a judgment entered in an action to which she was a party, brought in the Supreme Court of this State by the executors of the will, under section 2653a of the Code, to determine the validity of the probate which is herein attacked, and which judgment established such validity.

It appears from the judgment roll in such action, which is put in evidence here, that Barbara Ellensohn was made a party defendant in the action, was duly served with the summons therein, and appeared and answered by attorney, and is concluded by the judgment, which adjudges that the will is valid. This action was brought within one year after the will had been admitted to probate. The legislature, in enacting section 2653a, did not repeal the other sections of the Code providing for proceedings for revocation of probate, and the intention appears to have been to embrace the provisions of section 2653a within the existing system, not to substitute it therefor. *Long v. Rodgers*, 79 Hun, 443. It is expressly stated in that section that the verdict in an action brought thereunder shall be conclusive as to real or personal property, with exceptions which it is not claimed apply to this case. As the petitioner herein was a party to and is bound by the judgment in the Supreme Court action, she is concluded from further questioning the validity of the will and its probate, and further prosecution of the proceeding on her part in this court for revocation of the probate would be futile. *Matter of Peaslee*, 73 Hun, 113; *Matter of Soule*, 19 St. Rep. 532.

The petitioner, however, insists that the judgment is void because the plaintiffs in the action were permitted, by an order of the Supreme Court, to discontinue as against the infant defendant, Anna Kristof, the contention being that, as the statute pro-

vides that certain specified classes of persons must be made parties to actions brought under it, a trial could not be had until all such parties were regularly before the court, so as to be bound by any judgment entered therein. Opposition was made on behalf of the infant to the application for a discontinuance of the action against her, but the motion was granted; the court holding that the infant had no possible interest except under the testator's will; that she was not one of the next-of-kin; and that her grandmother (the petitioner herein), who is a next-of-kin, was bound by the judgment. From the order entered on this motion no appeal was taken, but thereafter an application was made by the petitioner, Barbara Ellensohn, at Special Term, to vacate the said judgment establishing the will, upon the ground that the whole judgment should be vacated as to all the defendants, because it had been as to the said infant, that the latter had not been properly served, and that all proceedings at and after the trial were void, although participated in by the adult defendants; the claim being that the statute peremptorily requires that a trial shall not be had until all necessary parties are regularly before the court. This application, however, was denied, it being held that it had already been adjudged by the order discontinuing the action against the infant that the latter was not a necessary party; that question having been necessarily involved in the disposition of that matter. From the order entered denying the motion to vacate the judgment the petitioner appealed to the General Term, which affirmed the order, holding that the mere fact that necessary parties are not before the court on trial does not oust the court of jurisdiction so far as the persons are concerned who are made parties to the action, and the only effect of such omission is that the judgment is not binding upon a party who has been omitted. *Keyes v. Ellensohn*, 82 Hun, 13. On appeal to the Court of Appeals the order was again affirmed, without opinion. 144 N. Y. 700. It seems to be thus definitely established that even if the infant, Anna Kristof, was a necessary party to the action brought to estab-

lish the will, the omission to make her such party is not available to Mrs. Ellensohn for the purpose of attacking the judgment.

The guardian of the infant, nevertheless, contends that, even if the petitioner is estopped from maintaining the present proceeding by reason of this judgment, still his ward may continue the same by reason of her having by her answer admitted the allegations of the petition in respect to the invalidity of the will, and asked that the prayer of the petition be granted. This proposition is untenable. There is no provision of law which authorizes the substitute of an assenting respondent in these proceedings in the place of the petitioner. See *Matter of Soule*, 19 St. Rep. 532. The infant was made a party to the proceedings solely by reason of the contingent interest devised to her by the will, and it is quite apparent that she could not have instituted the proceeding for revocation herself, the only parties who are entitled to maintain such a proceeding being those interested in the estate—that is, the husband and wife, heirs-at-law or next-of-kin, who would share in the estate in case of intestacy—the proceeding being one to remove the obstacle presented to such distribution by the existence of the will.

In order to overcome this difficulty, the guardian has put in evidence the laws of Austro-Hungary, where the minor, as well as her parents and her grandmother, Mrs. Ellensohn, reside, from which it appears that there is a limitation on the right of parents in that country to disinherit their children, except under certain prescribed conditions; and he claims that, therefore, his ward has an interest in the estate which must at some future period come to her through her said grandmother. But the succession to an intestate's personal property (and this testator's estate exclusively consisted of personal property) is governed by the law of the actual domicile of the intestate at the time of his death; and it devolves upon those entitled to take it as next-of-kin, according to the law of such actual domicile; and, as the decedent was at the time of his death an actual resident of and domiciled within the State of New York, the laws of that State

in respect to such succession must prevail, and under those laws the said infant would not, in case the testator died intestate, be entitled to any interest whatever in his estate. Code, section 2694.

The first ground upon which the motion to dismiss is made is, also, I think, well taken. It is claimed on the part of the petitioner that she filed her petition within one year after the recording of the decree admitting the will to probate, and this she insists is the date when the record of the probate proceeding was remitted from the Court of Common Pleas (where that proceeding was had) to and filed in this court. The decree admitting the will to probate was actually entered and filed in the office of the clerk of the Court of Common Pleas more than a year before the filing of the petition, and I am of opinion that any proceeding for the revocation of such probate should have been initiated one year thereafter, and it is conceded that this has not been done here. The motion to dismiss the proceeding is granted.

Motion granted.

Note.—This case was affirmed by the Appellate Division in 9 App. Div. 422.

Revocation of probate.

A Surrogate's Court cannot entertain proceedings to revoke the probate of a will which was entered in pursuance of the judgment of the Supreme Court. (Matter of De Hass, 24 Misc. Rep. 420.)

A husband of a decedent has such an interest as a tenant by the curtesy and a beneficiary under a former will that he can maintain an action to set aside the probate of the will of his wife. (Wells v. Betts, 45 App. Div. 115.)

An administrator of a life tenant cannot be substituted as plaintiff in an action brought by the life tenant to revoke the will. (Matter of Milliken, 32 Misc. Rep. 317.)

A surrogate may dismiss a proceeding for revocation of a will, where the petitioner wilfully refrains from serving the citation on certain parties before the return day. (Matter of Friedell, 20 App. Div. 382.)

In the Matter of the Judicial Settlement of the Accounts of
JAMES KEENAN ET AL., as Executors and Trustees of
THOMAS DOWNING, Deceased.

(*Surrogate's Court, Rensselaer County, Filed December, 1895.*)

1. **ADVANCEMENTS—INTEREST.**

Unless the will so requires, either by express terms or necessary implication, interest is not chargeable on advancements.

2. **EXECUTORS—ACCOUNTING—INTEREST.**

On final distribution, interest is not chargeable on moneys paid by direction of the court on a former partial distribution.

3. **WILL—VESTED INTERESTS.**

A will gave the property to the executors in trust during the life of the widow, and on her death to sell the real estate and divide the proceeds among the children. It further provided that if a son reformed before he reached a certain age the principal of his share should be given to him; otherwise it should be paid to his heirs on his death. The son died before he received the principal, leaving a will giving his share to his brother. *Held*, that his share was not vested so as to pass under his will, but went to his heirs.

4. **SAME—DEVISE TO CLASS.**

Where it is apparent that testator intended to divide his estate between two branches of his family by class, although the members thereof are mentioned by name, the antecedent death of one of the members of a class does not create a lapse, but his share passes to the survivors of his class.

Judicial settlement of accounts.

Akin & Keenan, for executors and trustees, James Keenan and John Magill; McClellan & Albertson, for legatees and devisee, Isaac Downing; G. L. Stedman, for legatees and devisees, Nancy Blackburn and Elizabeth Dunham.

LANSING, S.—Thomas Downing died in the city of Troy on the 9th day of April, 1886, leaving a last will and testament, which was duly admitted to probate by the surrogate of Rensselaer county June, 1886. The portion of the will chiefly in con-

troversy here relates to the distribution of the proceeds of the sale of the real estate, and is as follows:

"From the proceeds thereof (the real estate) first to make the distribution of my whole estate among my children equal, estimating that my two sons, Thomas and Isaac, shall have received the eleven thousand dollars by me advanced to my said wife. If the distribution shall not have been made so equal by the distribution of my personal property, and after making such equality, my said executors shall distribute the residue of the proceeds of my real estate equally among my five above-named children."

At the time of his death he left him surviving his widow, Susan Downing, and children, Thomas Downing, Jr., Isaac Downing, children by his second wife; Susan and Nancy Blackburn and Elizabeth Dunham, children by a former wife.

John J. Downing, a child by his former wife, died intermediate the making of the will in 1881 and the death of the testator.

Thomas Downing, for whom a special provision was made in the will by reason of his intemperate habits, died after the death of the testator, but before the death of his mother, Susan.

The testator, by his said will, gave all of his property, real and personal, to his executors in trust to distribute his personal property as follows: Nine-fifteenths among his wife Susan and her children, Thomas and Isaac; but provided that the sum of \$11,000, which he states he had theretofore advanced to his wife Susan, should be considered as a part of the nine-fifteenths of his personal estate to be given to her and her two sons in making such distribution. The remainder to be divided among his three children by his former wife, Nancy, Elizabeth and the said John J.

The testator provided that the executors should receive the rents of the real estate, and pay one-third to his wife Susan, and one-fifth of the remainder to each of his five children during the lifetime of his wife. He also authorized his executors

to sell any and all of his real estate, except the house in which he resided, the use of a portion of which he gave to his wife during her lifetime. At her death he directed that all of his real estate should be sold (if none had been sold prior to that time), and the proceeds divided equally among his children; but this division of the proceeds of the sale of his real estate was to be made upon the condition that, in making the prior division of his personal estate between the two branches of his family, there had been found sufficient personal estate to divide the same in the proportion of nine-fifteenths to Susan and her children, and six-fifteenths to his children by his first wife, estimating, in that division, that Susan and her sons, Thomas and Isaac, had received said sum of \$11,000 towards their share. But in case there had not been sufficient of the personal estate to equalize it in the proportion above stated between the two branches of his family, which I have treated as classes for reasons hereafter stated, then the proceeds of the real estate should be brought in; and, estimating that Thomas and Isaac, the children of his wife Susan, then deceased, had received the sum of \$11,000 aforesaid, a division or equalization should be made so that each branch of his family should first receive its share in the proportion of nine-fifteenths to six-fifteenths, and the remainder be divided equally among his children.

He further provided that if his son Thomas, who was an inebriate, should reform at or before he attained the age of thirty-five years, his executors might pay him the principal of his share; otherwise, they should retain the same in trust during his life, and on his death pay the same to his heirs.

In March, 1888, the executors accounted to the surrogate for the personal property of the deceased, and it was found that there remained for distribution only the sum of \$3,935.27, and that, bringing in the sum of \$11,000 for the purpose of equalization, said sum of \$11,000 exceeded nine-fifteenths, the share of his wife, Susan, and her sons, Thomas and Isaac; so the said sum of \$3,935.27 was by the decree of the surrogate paid

to his daughters by his former wife, Mrs. Blackburn and Mrs. Dunham.

On the 7th of January, 1895, Susan Downing died, and by her will, which was duly admitted to probate, she devised all of her property to her son Isaac; her son Thomas having died in 1891, leaving a will by which he devised all of his property (none having been actually received by him from the estate) to his mother. The executors and trustees have sold the real estate of the deceased since the death of Susan Downing, and there remains in their hands for distribution under said will the sum of \$7,351.97.

There are several important legal questions, arising under this will, which must be decided before this estate can be distributed. As we have seen, the widow, Susan, and her children took nothing upon the distribution of the personal estate under the decree of the surrogate, and it is insisted by Mrs. Blackburn and Mrs. Dunham, children of the former wife, that interest must now be added to the sum of \$11,000, previously advanced to Susan, from the time of the judicial settlement of the estate in 1888 to the present time. If this contention is allowed, they will receive nearly all, if not all, of the balance of the testator's estate. This presents an important question in this case, namely, should interest be allowed upon the sum of \$11,000 advanced by the testator to his widow, Susan? I do not find many authorities in this State upon the question of interest upon advancements. The case of *Verplanck v. De Went*, 10 Hun, 611, is cited as a case in point by counsel for Mrs. Blackburn and Mrs. Dunham. That case simply holds that the proper construction of the will in that case required the sum of \$5,000, advanced to a legatee, to be treated as a debt, and it, therefore, should draw interest from the time the debt became due; but it does not support the general proposition that advancements, as such, draw interest. It is settled by numerous authoritative decisions in other States, and also in the courts of England, that nothing is to be allowed for increase or interest on advancements simply

as such. See *Williams Ex'rs* (7th ed.), 1606, note G, where numerous authorities are cited in support of this proposition,—among others, *Black v. Whittall*, 9 N. J. Eq. 572; *Osgood v. Breed*, 17 Mass. 358; *Nelson v. Wyan*, 21 Mo. 347; *McCaw v. Blewit*, 2 McCord, Ch. 90; *Pigg v. Carroll*, 89 Ill. 205.

These cases proceed upon the ground that an advancement is no part of the estate to be administered upon, consequently advancements as such never draw interest.

The only case which I have been able to find in this State, except the one cited from Hun, is *Ex parte Oakey*, reported in 1 Bradf. 281, where the learned surrogate (BRADFORD) says: "Nothing is said in the will as to interest, and in the absence of any express direction on that point, no more can be deducted from the share of the legatee than the principal sum advanced."

The surrogate cites *Andrewes v. George*, 3 Sim. 393, which holds interest may be computed on advancements made by a father to his children from the time that the property was to be divided among them only.

It appears to be well settled from the authorities cited that interest is not to be charged upon advancements in case of intestacy. See, also, 1 Rev. St. 754, sec. 25, which declares, except when the child stipulates in writing as to the value of property received, "such value shall be estimated according to the worth of the property when given."

It follows that, where a person dies testate, no interest can be charged unless the will, by its terms or by necessary implication, requires it. The will in this case directs that the \$11,000 shall be brought in for the purpose of equalizing the testator's estate among his children, but it does not provide, in terms, that interest shall be added, nor do I think the will, by any fair construction of its provisions, requires it. It is apparent that the testator apprehended that the \$11,000 advanced to his wife, Susan, might exceed the nine-fifteenths of his personal estate; for he provided that, before an equal division of his property should be made among his five children, the whole of the estate,

real and personal, should be brought together, and a division made between them, the two branches of his family, in the proportion above stated, based upon the assumption that the children by his last wife had received the \$11,000 advanced to her.

It seems to me that this sum of \$11,000 is simply used as a factor for the purpose of equalization; in other words, it is only to be used in making the share of Susan's children nine-fifteenths of the entire estate before an equal division should be made among all of his children.

There is no claim that the children of the second wife have actually received this \$11,000; so that, as to them, it is neither technically nor substantially an advancement.

Again, the testator is supposed to know the situation and value of his property, and the result tends to show that he did. It is obvious, also, that he supposed he had sufficient property to make a substantial division among his five children, after his property had been equalized and divided in the proportion of nine to six (including the \$11,000) between the two branches of his family, for he provided that one of his children by his last wife, Thomas Downing, should have his share remain in the hands of his (testator's) trustees, under a certain contingency, during his lifetime, and the income thereof paid for his maintenance and support—a provision which would be unnecessary if he intended that the provision which he had made for his wife should draw interest until the ultimate division of his property, since he obviously contemplated (by the provision he made for her) that her life would be protracted many years, in which case, by the addition of interest, there would be nothing, or substantially nothing to divide among her children after her decease. This provision for his wife was doubtless provided so that the income thereof should furnish her support during her life, and it would be manifestly unjust, and not within the intention of the testator, to charge his children by her with the income which he had provided for her support. I am quite clear that it is not within the intent of the testator, as disclosed by his will, to have

interest charged upon the said \$11,000 upon the present division of his estate.

It has been suggested that interest at least should be charged from the death of his wife, Susan, which occurred January 7, 1895, at which time the division of his estate was to be made. I think the better view is that the division contemplated was the division to be made by the executors on the judicial settlement of their accounts, proceedings for which were instituted by the executors as soon as practicable after the sale of the real estate.

I am, also, of the opinion that the contention of Isaac Downing, a son of the last wife, that the amount received by the children of the first wife, Mrs. Dunham and Mrs. Blackburn, upon the division of the personal property, January 21, 1888, of \$3,935.27 under the decree of the surrogate, should draw interest from that date, is untenable. This amount was paid to them in pursuance of the will by a decree of the surrogate, and, although it is to be considered as a part of the estate in the ultimate division, for the purpose of making their six-fifteenths of the estate before ultimate division shall be made among all the children, yet I see no reason why it should draw interest. It is not an advancement. It was received by them under a decree of the court, and constitutes so much of their share in the ultimate division of the estate. It is not a debt which they owed the estate, but is theirs of right. I do not think it was contemplated by the testator that these children should pay interest upon the amount they received on the distribution of the personal estate, nor do I find any principle of law which requires them to make such payment.

The claim of interest on said sum is disallowed.

Another contention on the part of Isaac Downing is that the share of Thomas Downing, Jr., his brother, who died before the death of his mother, Susan, and, consequently, before receiving any portion of this estate, leaving a will by which he devised said interest to Isaac, should be paid to him. I cannot agree with this contention. In the first place, the will plainly pro-

vides that, in case the said Thomas Downing, Jr., should not be paid the principal of his share during his lifetime, that the executors of Thomas Downing, Sr., should pay the share of the said Thomas Downing, Jr., to "his heirs-at-law," who are the said Isaac and his two half-sisters. The statute provided that children of half-blood shall take equally with those of the whole blood. 1 Rev. St., ch. 2, sec. 6.

But it is insisted by the said Isaac that the individual interest of Thomas Downing, Jr., became vested on the death of his father, and was, consequently, alienable and devisable during the lifetime of his mother, Susan, and that the same came to him, the said Isaac, under the will of his mother. The real estate in this case is given to the executors in trust to receive the rents and profits of the said real estate and divide the same, as provided, during the lifetime of the widow, and upon the further trust to sell the real estate and divide the proceeds among the heirs of the said Thomas Downing.

The gift of the title to the real estate to the executors, with the right to receive the rents and profits, with direction to sell and divide the proceeds of the real estate upon the death of the widow among the several persons named, created a power in trust, general and imperative (1 Rev. St., pt. 2, c. 1, tit. 2, art. 3, secs. 74, 76, 79, 94), and suspended the vesting of any interest in the proposed beneficiaries until the power was executed. *Delaney v. McCormack*, 88 N. Y. 174, 183; *Dana v. Murray*, 122 N. Y. 604, 612.

The case of *Delafield v. Shipman*, 103 N. Y. 463, is much in point. In that case the court, through EARL, J., say: "The whole income is not given to the children during the life of the widow, and during her life the estate is vested in the trustees. There is no direct gift to the children, but simply a direction for a division among them after the death of the widow." In such case the title is not vested in the children during the life of the widow.

In the case of *Warner v. Durant*, 76 N. Y. 183, FOLGER, J.,

says: "Where there is no gift but by direction to executors and trustees to divide and to pay at a future time, the vesting in the beneficiary will not take place till that time arrives."

In the case of *Smith v. Edward*, 88 N. Y. 92, FINCH, J., giving the opinion of the court, says: "It has been often held that, if futurity is annexed to the substance of the gift, the vesting is suspended; . . . that, where the only gift is in the direction to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift."

This leads to the conclusion that the individual share of Thomas Downing, Jr., in the remainder of the estate, if any shall be due him, must be equally divided among his brother and half-sisters.

The remaining question is what becomes of the share of John J., who died before the death of the testator, leaving no descendants. Ordinarily, under a well-settled rule of construction, when the limitation creates a tenancy in common, the gift being to several persons by name, and not to them as a class, the share of the one dying before the testator, or before the time when it vests, is lapsed, and should be distributed as intestate estate. *Downing v. Marshall*, 23 N. Y. 366; *Gill v. Brouwer*, 37 id. 549; *Jarm. Wills*, 538.

While the law infers a personal legacy to each child, when there are several, from a specification of them by name, yet the rule is not inflexible. The substantial intent of the testator must control, rather than the words. *Hoppock v. Tucker*, 59 N. Y. 203, 208; *Stedman v. Priest*, 103 Mass. 296.

I am of the opinion, from an examination of the will, in connection with the conceded facts in the case, as I have above indicated, that, as to the first division (the personal and so much of the proceeds of the real estate as may be necessary to complete it), the testator intended to make a division between the two branches of his family by class, so that the death of John J.

occasioned no lapse, although he was made a tenant in common, since the members of the class antecedently dying were not actual objects of the gift, and the entire subject of the gift vested in the survivors. *Downing v. Marshall, supra.*

As to the present division of the remainder of the estate, the language of the will is quite clear that the testator intended it to be divided among his children as individuals. The language is, "The remainder to be divided equally among my five children above named," in which case it follows that the share of John J. in the remainder either lapsed and fell into the body of the estate, and as to that portion the testator died intestate, or that it became a portion of the remainder to be divided among testator's children; in either event it would take the same direction, and be ultimately divided among the remaining children of the deceased.

Decreed accordingly.

In the Matter of the Appraisal under the Transfer Tax Acts
of the Property of GEORGE WILLIAM SUTTON, Deceased.

(*Surrogate's Court, Westchester County, Filed December, 1895.*)

1. TRANSFER TAX—REAL ESTATE.

The mere fact that by the terms of the will there is an equitable conversion does not render the real estate taxable as personalty.

2. SAME—MORTGAGE.

Mortgage debts of testator should not be deducted from the personalty in appraising the value of the estate.

Proceedings under the Transfer Tax Act.

Martin S. Smith, for executors, appellants; James M. Hunt,
for county treasurer, respondent.

SILKMAN, S.—The decree assessing tax in this matter must be modified in so far as a tax is assessed upon the succession to the equity of redemption in the real estate. The ground upon which such tax was assessed is that such equity of redemption is personalty under the rule of equitable conversion and the succession thereto is, therefore, taxable. There is a clear equitable conversion by the terms of testator's will.

Laws providing a system of taxation are to be construed as relating to facts, not legal fictions or equitable rules. *Hoyt v. Commissioners of Taxes*, 23 N. Y. 228; *Matter of Romaine*, 127 id. 80.

The doctrine of equitable conversion does not apply in all cases. *Wilder v. Ranney*, 95 N. Y. 7.

The property of which the testator died possessed was, in fact, real estate and taxable as such. By another equitable rule the parties in interest, if all *sui juris*, could by uniting take it in place of the proceeds, and a court of equity would on application restrain the exercise of the power of sale in the executors, and thus the property might never take on the character of personalty.

The claim of the legatees, that mortgage debts should have been deducted by the appraiser from the amount of the personal property for the purpose of arriving at the value of the succession, cannot be sustained.

The real estate is the primary fund out of which the mortgages are to be paid, and the legatees take only the equity of redemption; such is the law of this State.

An order may be entered modifying as indicated the decree entered upon the appraiser's report.

Decreed accordingly.

Note.—This opinion was affirmed by the Appellate Division in 3 App. Div. 208.

In the Matter of the Judicial Settlement of the Accounts of
GEORGE A. STONE, as Executor of HELEN TORRANCE,
Deceased.

(Surrogate's Court, Rensselaer County, Filed December, 1895.)

1. WILL—CONSTRUCTION.

Testatrix's will gave the balance of moneys to her credit in bank, after the payment of prior legacies, to a charitable association. At the time of making the will, and at her death, there was not enough money in bank to pay the legacies, but the president of the bank had in his hands securities in which he had invested her moneys as her financial agent. *Held*, that the words "moneys in bank" included such securities.

2. SAME—BEQUEST TO CHARITABLE CORPORATIONS.

Where a decedent leaves a husband, wife, children or parents, bequests to charitable corporations in excess of one-half the estate are void.

Judicial settlement of the accounts of the executor, involving the construction of the will of deceased.

Helen Torrance died April, 1895, leaving a will bearing date May 20, 1890. She left her surviving sons, William M. Torrance and George R. Torrance, and a grandchild, Helen R. Torrance, a daughter of a deceased son. By her will she gave \$5,500 to different religious and charitable objects, also \$500 to R. D. Williamson. She also gave various articles of personal property to various persons.

By the 7th clause of her will she provides as follows: "Should there be any money in the bank to my credit after the preceding sums have been paid, I give and bequeath the same to the board of ministerial relief of the United Presbyterian Church of North America."

At the time of making the will, her estate in cash and securities amounted to about \$7,700, of which only \$400 was in cash in the bank. At the time of her decease, testatrix had in the bank in cash \$5,347.36, of which \$3,052.50 was in the Troy

Savings Bank, the balance in the Troy City National Bank, and securities amounting to \$11,000. The money disposed of by her will in general legacies amounted to \$6,500, including a legacy given to Mary Stone, of Troy, of \$500 by a codicil to her will, dated March, 1894.

George A. Stone, the sole acting executor of her will, was president of the Troy City National Bank and acted as agent of the deceased in investing her money, selling her securities and investing in others as he deemed it for her interest. It appears that the money of the deceased came from the principal sum of \$92,000, left by her husband, from which she received an income ranging from \$2,000 to \$5,000 or more a year. The income was received by Mr. Stone for her. She applied such portion of it as she chose for her support and other purposes, and the balance he, without special direction from her and without her knowledge, invested from time to time in various securities. He states that she gave him no specific directions upon the subject and had no knowledge of the character of the investments which he made until he informed her afterwards. It appeared that the amount she had to her credit in the bank, of which Mr. Stone was president, and subject to her draft, varied, sometimes only a few dollars, at other times several thousand dollars. She kept a bank book and drew her money in the usual way by check.

E. W. Douglas, for executor; Clarence E. Akin, for the board of ministerial relief of the United Presbyterian Church of North America; George R. Donnan, for next-of-kin.

LANSING, S.—The sole controversy in this case is as to the proper construction of the seventh clause of the will, which is stated above. A narrow and limited construction of the clause, "Should there be any money in the bank to my credit after the preceding sums have been paid (which amount to \$6,000), I give it to the board of ministerial relief," would render that

clause entirely inoperative; for neither at the time of making her will nor at her death did she have enough money (strictly such) to her credit in the bank to pay the general legacies, and the result would be that the legacies which she had provided for the several objects of her bounty could not be paid in full; and it is further obvious that she would die intestate as to the body of her estate, which consisted of securities in the possession of Mr. Stone, readily convertible into money to the amount, at the time of her death, of \$11,000.

The cardinal rule in the interpretation of wills, as other instruments, which must be followed if consistent with the rules of law, is to ascertain the intent of the testator. This intent must be first sought in the language of the instrument. The intent inferable from the language of one clause may be qualified or changed by other portions of the will evincing a different intent. *Hoppock v. Tucker*, 59 N. Y. 292.

Another rule is that every clause of the will must receive a reasonable construction, and the whole rendered effective if possible. Extrinsic evidence may also be employed, not to contradict the will, but to interpret it in accordance with the intent of the testator. When extrinsic evidence, properly introduced, creates an ambiguity in an instrument otherwise reasonable and clear in its language, the ambiguity may be explained by the same kind of evidence. *Galen v. Brown*, 22 N. Y. 37; *Tillotson v. Race*, id. 126; *Abb. Tr. Ev.* 130, note; *Matter of Hastings*, 6 Dem. 307.

Another well-settled rule of interpretation of wills is that where a will is capable of two constructions, one of which will dispose of the entire estate of the testator, and the other leave a portion undisposed of, the former will be adopted. *Vernon v. Vernon*, 53 N. Y. 351; *Lamb v. Lamb*, 131 id. 227.

Applying these rules of interpretation to this instrument, I am of the opinion that the testatrix, intending, as it must be assumed, to dispose of her entire estate by will, did not intend to cut down the provisions which she had made for the objects

of her bounty to the sum which she might chance to have at her death in cash at the bank, or subject her beneficiary in the seventh clause of the will to the hazard of receiving a nominal sum or none at all, if she did not chance to have more than the \$6,000 in cash to her credit at the time of her death.

The evidence shows that at the time of making her will she had only the sum of \$400 subject to draft at the bank, and she knew it. It further shows that Mr. Stone, the president of the bank, was her financial agent, handled her funds as he did his own, converting her securities into money and her money into securities, as he judged for her interest, informing her from time to time of what he had done. It further appears that at the time of the making of her will she was possessed of about \$7,700, including securities and cash in the bank of \$400, and that by her will, if she counted the securities as money, she had sufficient to pay all the general legacies in full, and about \$1,700 would fall under the seventh clause of her will to the ministerial relief association, which was a very reasonable disposition of her property in view of her apparent desire to dispose of it for benevolent purposes.

I am very clear, taking the will and all the circumstances together, and the fact that the will was prepared by a layman, that by the language "money to my credit in the bank" she meant not only her money, but also her securities in the hands of Mr. Stone, the president of the bank, using the word "money" as synonymous with and embracing securities; that by the phrase "to my credit in the bank" she meant her money and securities in the hands of Mr. Stone; and that she intended to give the rest and residue of her estate to the board of ministerial relief. This, I think, is the only reasonable construction to be given to her language under the circumstances disclosed in this case; for, at the time of making the will, she directs, "after the preceding sums have been paid," which amounted to the sum of \$6,000, then, "should there be any money in the bank" to her credit, that the same should go to the board of ministerial

relief, showing clearly that she did not intend to die intestate as to any of her property, and also that she regarded the securities as money to her credit in the bank. This interpretation of her language renders all the provisions of the will operative, and is in harmony with the facts and circumstances connected with the disclosure of the value and situation of her estate and the production of the will. Treating, then, the \$16,000 in the hands of Mr. Stone, her agent and executor, as "money in the bank to her credit," the general legacies must be first paid, and the balance will fall in the seventh or residuary clause of her will, as the testatrix doubtless intended.

But there is an arbitrary statute which has not been considered and was doubtless unknown to the testatrix and the draftsman of her will, which reads as follows:

"No person having a husband, wife, child or parent shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, . . . religious or missionary society . . . or corporation, more than one-half part of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more." Laws 1860, ch. 360, sec. 1.

A testator cannot give to two or more charitable objects more than he can give to a single object, viz.: more than one-half of his estate. *Chamberlain v. Chamberlain*, 43 N. Y. 425.

Where a testator makes devises which are invalid, he dies intestate as to such portion as is not effectually disposed of by will. *Lefevre v. Lefevre*, 59 N. Y. 446.

Applying this statute to the distribution which would otherwise be made, it must be modified as follows:

(1) There must be deducted from the entire estate the debts of testatrix, the expenses of administration, including commissions.

(2) The remainder must be divided into two equal parts, one moiety of which must be distributed to the next-of-kin of

the deceased, in accordance with the statute of distribution; out of the remaining moiety there must be paid the several legacies, amounting to the sum of \$6,500, provided in the will, and the balance must be paid, under the seventh clause of the will, to the board of ministerial relief of the United Presbyterian Church of North America.

Decreed accordingly.

**In the Matter of Probate of the Will of MARY MURPHY,
Deceased.**

(Surrogate's Court, Rensselaer County, Filed December, 1895.)

1. WILL—EXECUTION—KNOWLEDGE OF CONTENTS.

Where the will of an illiterate testatrix was read over to her by the scrivener before execution, it will be assumed that he read it correctly, and all of it, and that her statement that it was all right was made with knowledge of its contents.

2. SAME—PROBATE.

Where the will was signed by testator's mark and one of the witnesses has died, the handwriting of the latter may be proved and the testimony of the surviving witness, who saw the mark made, will be sufficient to prove due execution.

3. SAME—PUBLICATION.

Publication of a will may be made by an affirmative answer to a question or even by a sign.

4. SAME.

The publication and a request to the witnesses to sign may be incorporated in the same words or acts.

5. UNDUE INFLUENCE—MASTER AND SERVANT.

Undue influence will not be presumed from the mere existence of the relation of master and servant between the testatrix and legatee, where it appears that they were relatives, sustained close and friendly relations, that the services of testatrix were performed voluntarily, from motives of love and affection, and that she received no salary.

Application for the probate of the will of deceased. Objections were filed thereto upon the ground that the said will

was not properly executed; also upon the ground of fraud and undue influence.

Mary Murphy was a native of Ireland, and came to Troy in 1835 and resided there at the time of her death, which occurred February 25, 1895, aged about eighty years. The paper offered for probate was made about five years before her death, and is dated March 31, 1890. The deceased could neither read nor write. She had been married, but her husband died about twenty years prior to her decease. There was no issue of her marriage. The deceased left her surviving a brother, John Ahearn, and two sisters, Mary Boyle and Elizabeth Kelly, and several nephews and nieces who resided at Troy, and a sister, Helen Grady, residing in Boston, Mass., and a niece in Ireland. She and her husband took a female child in its infancy, named Julia, and cared for it down to the time of her husband's death, when the child was about eleven years of age, after which time she ceased to live with testatrix. Subsequently Julia, when about nineteen years of age, married one John Cummings. The child was not legally adopted, but was given the family name, and was known as Julia Murphy. The testatrix was at service and lived with her brother, Michael Ahearn, at the Union House, a hotel in the city of Troy. Michael Ahearn died about twenty years ago, and upon his decease Peter Buckley, the husband of Mary Buckley, the proponent, leased the house and continued its occupation until after the death of testatrix. When he took charge of the house the testatrix, who was previously employed as cook at that place, continued in the service of Mr. Buckley and his wife, Mary Buckley, who was a niece of testatrix, and remained in such service until the time of her death. It does not appear that any contract was made between the Buckleys and testatrix for her service during her stay there, or that any regular wages were exacted or paid to her by them during her entire service there. They made her presents of clothing and she received small sums of money from time to time.

The will, after giving her brother, Andrew Ahearn, residing

in Ireland, and who has since died, and to Helen Grady the sum of \$100 each, gives the balance of her property, consisting of money in bank, something less than \$3,000, to Mary Buckley.

There were two subscribing witnesses to the will, one of whom was James H. Ryan, a lawyer, and the draughtsman thereof, who died more than a year before the death of the testatrix; Peter Buckley, the other subscribing witness, is the husband of the proponent and principal beneficiary. Buckley alone gave testimony in regard to the execution of the will.

The remaining facts appear in the opinion.

Frank S. Black, for executrix, Mary Buckley, proponent, and for Ellen Murdock, Fannie Boyd, Kate Cratty and Mary Buckley, individually; Martin & Kelly, for John Ahearn, Elizabeth Kelly, John F. Ahearn, William H. Ahearn, Helen Grady, Agnes Frelick and John Ahearn; Frank T. Noonan, for Helen Grady.

LANSING, S.—Two important questions are presented for decision in this case. The first relates to the execution of the will. The second involves the charge of fraud and undue influence in procuring its execution on the part of the principal beneficiary. It is claimed on the part of the contestants that the will was not properly published by the deceased, and also that the deceased was not advised of the contents of the will prior to its execution. There is no claim made that she was not a woman of fair intelligence and of sound mind, but it is claimed that since she could neither read nor write it was necessary for the due execution of this instrument to show that it was read to her, or, at least, that she understood its contents. This is undoubtedly the law. *Matter of Lansing*, 17 St. Rep. 440. The body of the will is in the handwriting of James H. Ryan. The signature of James H. Ryan, as a witness to the will, was proven. The will was signed by the testatrix by making her mark. Peter Buckley, the sole surviving witness, testified that

he signed his name to the instrument as a subscribing witness in her presence and at her request, and that he saw Mr. Ryan attach his name and make the cross between the words "Mary" and "Murphy," Mrs. Murphy touching the pen; that afterwards Mr. Ryan asked Mrs. Murphy, who was sitting at the table at his side, "if she wanted Mr. Buckley and him to witness the will, and she said, 'Yes.' " Mr. Buckley also testified that Mr. Ryan was preparing the will when he entered the sitting room, had it nearly finished, and that he saw or heard Mr. Ryan read the will to testatrix; "she said it was all right;" that, after its execution, Mr. Ryan said, "Mrs. Murphy, I will take this will and put it in my safe." Although Mr. Buckley's testimony is not very explicit or satisfactory as to what he heard or remembered in regard to the contents of the will when he heard it read to testatrix, yet I think it appears satisfactorily that Mr. Ryan did read the will to the testatrix, and that she knew its contents prior to its execution, unless a fraud was perpetrated upon her by Mr. Ryan in failing to read some portion of it to her, or in pretending to read what was not in the will. Mr. Ryan was a lawyer of considerable experience, and had been engaged for many years in the practice of law in Troy. There is no charge of any deception or wrongdoing upon his part in the matter, and I do not think I have the right to assume any misconduct on his part in the performance of his duty. On the other hand, I think that, when it appears that Mr. Ryan was engaged in the act of reading the will to her, I must assume that he read it correctly, and all of it, and that, when she stated it was "all right," she understood its contents, and approved of it. Buckley was not called to hear the will read, or to be advised of its contents. If I am correct in the conclusion I have drawn from this testimony in respect to the execution of the will, I think it was formally and duly executed.

It is well settled in this State that a will may be properly executed by the mark of the testator; and, where one of the subscribing witnesses is dead, his handwriting may be proved,

and the testimony of the surviving witness who saw the mark made will be sufficient to prove the due execution of the instrument. *Matter of Kane*, 2 Connolly, 249; *Matter of Dockstader*, 19 St. Rep. 245; *Matter of Hyland*, 45 Law Journ. 209; *Matter of Wilson*, 76 Hun, 1. No particular form of words is required to constitute the due publication and request. It is a substantial compliance with the statute if in some way or mode the testator indicates that the instrument the witnesses are requested to subscribe as such is intended and understood by him to be his will. *Matter of Hunt*, 110 N. Y. 278, 281.

The declaration may be made in answer to a question, or even to a sign. *Coffin v. Coffin*, 23 N. Y. 15.

Publication and request may be incorporated in the same words and acts. *Matter of Kane*, *supra*; *Coffin v. Coffin*, *supra*.

The words of request or acknowledgment may proceed from another, and will be regarded as those of the testator if the circumstances show that he adopted them, and that the party speaking them was acting for him with his assent. *Gilbert v. Knox*, 52 N. Y. 125, 129.

The publication and request are both, I think, embraced in the language which Mr. Ryan used to testatrix when he asked her "if she wanted Mr. Buckley and him to witness the will," which was then present, and had been prepared by him in her presence, and executed by her; and, if I am right in my conclusion that she knew the contents of the will, I think the will was sufficiently executed to meet the strictest requirements of the statute.

The remaining question, namely, whether this will was the result of fraud and undue influence, is the more serious one, and requires a somewhat careful examination of the evidence and the law applicable thereto. The testatrix was about seventy-five years of age; had received a somewhat serious injury in the breaking of her arm about a year before the making of her will; was somewhat feeble in health; but, as far as appears, was not affected by any weakness of mind or memory. The evidence

tends to show that she knew who were the objects of her bounty, and that she had sufficient mind and memory to decide between them, and also knew the amount and condition of her property. But the contestants, while not assailing the general proposition above stated, insist that the relation between the proponent and testatrix was that of master and servant; that there was dependence on the one hand, and control upon the other; and that in such a case the law will presume coercion, undue influence, or fraud unless the contrary appears by the most clear and satisfactory evidence. There is, undoubtedly, ample authority in support of this proposition if the fact shall be so found. *Sears v. Shafer*, 6 N. Y. 268; *Ford v. Harrington*, 16 N. Y. 285. They further insist that the will is an unnatural one, since the testatrix, by this instrument, gave the body of her estate to a single niece, and thereby ignored the claims of those who were the natural objects of her bounty—her brothers and sisters; and they insist that, at least, a more wide distribution of her property among her numerous relatives, including those of a like degree of relationship as Mrs. Buckley, would have been more natural, and more in accordance with the presumed state of her affections.

On the other hand, the proponent insists that the relation of master and servant, as those terms are used and that relation is understood and treated in law, did not exist between these parties; that they were kindred by blood, and that such relationship was recognized between them in their intercourse with each other, and that their relations, from their long residence together and the intimacy of their intercourse, was more like that of mother and daughter; that, at least, they were, in addition to their kinship, very close friends and associates, between whom the most confidential and affectionate relations existed; and that the relation of master and servant was not recognized by them, or either of them, and did not in fact exist between them (whatever their outward or apparent relations were), and therefore the presumptions growing out of the relation of master and

servant cannot be claimed in this case. The proponent further insists that the testatrix's relations with her brothers and sisters and other relatives, except the sisters of the proponent, were neither cordial nor close, indeed were hardly friendly, and that with one of them (Mrs. Powers) she was not on speaking terms, and that the same is true of her relations with her adopted daughter, with whom she had a serious difficulty, and to whom she had not spoken for five years prior to her decease; that a knowledge of the testatrix's relations with other kindred (aside from Mrs. Buckley and her two sisters, Mrs. Boyd, formerly Ahearn, and Mrs. Murdock) would have at once suggested the conclusion that Mrs. Buckley would be the principal recipient of her bounty.

The law applicable to the various relations between these persons, as claimed by the contending parties, is well settled. If this instrument was solely the offspring of love and affection, however the same may have been prompted or caused, it should stand as the will of the deceased. *Tucker v. Tucker*, 45 St. Rep. 458; *Coit v. Patchen*, 77 N. Y. 533, 539; *Matter of Green*, 67 Hun, 527.

If, on the other hand, it was the result of dependence upon the part of the testatrix, and of control on the part of the principal beneficiary, it is, in law, the product of fraud, imposition, or coercion, and its probate should be refused. *Matter of Green*, *supra*; *Tyler v. Gardiner*, 35 N. Y. 559.

This leads us to an examination of the evidence to ascertain what was the actual relation existing between these parties (proponent and testatrix) at the time of the making of the will, for the purpose of determining (1) where the burden of proof rests in this case, and (2) of determining whether the party upon whom the burden rests has sustained the same.

The testatrix lived with the proponent many years, and, doubtless, performed the duties of servant, although it appears to have been of her volition, without contract or compensation for her services. She was at the same time a friend and a relative.

There was a sharp contest between these parties upon the trial as to what were the real relations between the testatrix and her niece, Mrs. Buckley. The evidence upon the part of the contestant tends to show that she was a mere servant, a drudge in the kitchen, getting up early, working hard day in and day out; that she occupied the servant's quarters, was not introduced to friends of the family, did not sit at the table with the family—in fine, was treated as a servant and was such; that the testatrix was old, somewhat feeble in health, was ignorant, could neither read nor write, and was therefore easily the subject of fraud and imposition, and that her situation and relations with Mrs. Buckley were such as to afford her ample opportunity to alienate the affections of the testatrix from the balance of her kindred, and center them on herself; that the manner of the production of the will, as shown by the testimony, indicated fraud, if not coercion, in its production; that Mr. Ryan was comparatively a stranger to testatrix, and the will was prepared shortly after a serious quarrel with her adopted daughter in relation to the custody of the bank books; and that the proponent took advantage of the testatrix's natural resentment and of its influence over her to obtain from her this will. There is no direct evidence of any fraud or coercion in making this will, and I fail to find anything growing out of the manner of its immediate production which indicates that any undue advantage was taken of her by the proponent. It is true Mr. Ryan was a comparative stranger to her, but she had employed him to procure her bank books from her adopted daughter, Julia Cummings, who refused to give them up. It appears that, shortly after obtaining the books, she requested Mr. Ryan, in the presence of Mr. De Groot, his clerk, to draw her will, and in a few days afterwards her will was drawn under the circumstances above narrated. Mrs. Buckley appears to have been in or about the room when the will was drawn, for, when it was partially completed, she went, and called her husband, Mr. Buckley, who was asleep in another part of the house, to come and witness the will. Nothing

appears from the circumstances attending the making of the will to show that the instrument was not the result of an intelligent mind, acting without restraint or undue influence. As to the relations between these parties, testatrix and proponent, it is safe to say that they were apparently those of master and servant, whatever their real relation might be. The testatrix was unlettered, mingled but little with the world, had been in the kitchen of the proponent for twenty years. She was also quite advanced in years, had been in ill health for some time, and, under such circumstances, would, doubtless, look to Mrs. Buckley for advice and counsel.

I am of the opinion, therefore, under the circumstances, that the instrument should not be admitted to probate upon the bare proof of its formal execution, but that it was the duty of the proponent to go further, and show that, while their apparent relations were those of master and servant, their real relations were otherwise, or, at all events, that proponent had taken no advantage of her relations with testatrix; and the burden of proof, I think, was therefore upon proponent to show the will was the result of testatrix's own free act. *Van Pelt v. Van Pelt*, 30 Barb. 134; *Loder v. Whelpley*, 111 N. Y. 239.

This proponent has essayed to do, and has introduced very considerable testimony tending to show that the relations between her and testatrix were not those of master and servant, but were those of kindred and close, intimate friendship; that the testatrix was never treated in the family as a servant; never ordered or directed as to her work; that no work was exacted of her more than she desired to do; that she performed her duties from motives of love and affection, rather than for pay; that she was counseled with, advised, and treated as a mother would have been had she been performing the same duties for her daughter; that testatrix roomed with the sisters of the proponent, and with proponent's own daughter, was nursed, when sick, by proponent and her family, and was in all respects, so far as consistent with her employment, treated as a friend and

relative; that the testatrix served without compensation other than such as one member of a family would naturally give to another by presents and voluntary purchases of articles of clothing, from time to time, as affection on the one side and apparent needs upon the other prompted. The proponent also offered considerable testimony tending to show that the relations between the testatrix and her brother and sisters were not cordial; that her intercourse and association with them was infrequent; and that, with the exception of her sister in Boston (Mrs. Grady, who had a pension), they were all in comfortable circumstances. It further appears from the evidence in this case, the most cogent of which was furnished by Mrs. Boyd, a witness called by the contestants, that the relations between the testatrix and proponent were more intimate and affectionate than those between the testatrix and any of her other relatives. Indeed, Mrs. Boyd testified that she roomed with testatrix for many years when she resided with her sister, the proponent; that she learned in her intercourse with testatrix that her affections were centered upon the proponent, and that the proponent was her favorite among all her relatives; that she was also greatly attached to the proponent's family, and was exceedingly kindly treated by them. Mrs. Boyd's testimony, which appears to be frank and unbiased (since she had some reason to expect from her relations with the testatrix that she would be remembered in her will), furnishes satisfactory evidence, in connection with the other facts and circumstances in the case, that the will was made in accordance with the affections and unbiased inclination of the testatrix.

In conclusion, this instrument, following the lead of the testatrix's affections, and being offspring of an intelligent mind, unaffected by fraud or coercion, however partial it may appear or unjust in discriminating against her other relatives, is fully established as the will of the deceased, and must be admitted to probate.

Decreed accordingly.

Nota.—A request to the witnesses to sign, made by a person who is superintending the execution of a will, within the hearing and with the silent permission of the testator, is equivalent to a publication and request by the latter. (Matter of McGraw, 9 App. Div. 372.)

A statement that the paper is a "document" or "instrument" is insufficient. (Matter of Tyrrell, 28 Misc. Rep. 106; *affd.* 47 App. Div. 560; Matter of Delprat, 27 Misc. Rep. 355.)

Knowledge of the contents of the will may be presumed from the facts that the draft from which it was prepared was submitted to the testatrix, and that she retained the will until her death. (Matter of Rohe, 22 Misc. Rep. 415.)

In the Matter of the Will of MARTHA B. HALBERT, Deceased.

(Surrogate's Court, Oneida County, Filed December, 1895.)

1. TESTAMENTARY CAPACITY.

Eccentricities, religious beliefs, peculiarities, and even impairment of mind, do not render a person incompetent to execute a will.

2. SAME—AGE.

There is no presumption of incapacity by reason of advanced age.

3. SAME.

If one can comprehend the act he performs, knows the persons who are the subjects of his bounty, understands the nature and extent of his property, is able to retain these matters in his mind during the execution, and the testamentary act is free from delusions, he has testamentary capacity.

4. SAME—INTOXICATION.

To establish incapacity by reason of the use of intoxicating liquors, it must be shown that testator was in fact intoxicated at the very time that the will was executed, or that his mind was so clouded by drink that he was incompetent to give expression to his real intentions.

5. UNDUE INFLUENCE.

Influence is not undue if it is a reasonable argument, suggestion, advice, persuasion or urging one's personal claims upon the bounty of another.

6. TESTAMENTARY CAPACITY—SPIRITUALISM.

Testamentary capacity is not affected by a belief in spiritualism, where no delusion arising from such belief entered into the preparation or execution of the instrument.

Proceeding to revoke the decree of probate heretofore entered.

L. E. Goodier, for contestants; H. S. Patten (William Kernan, of counsel), for proponent.

CALDER, S.—This proceeding is to revoke the decree entered in the surrogate's office of Oneida county on the 3d day of December, 1894, admitting to probate, after a prolonged contest, the last will and testament of Martha B. Halbert, deceased.

Surrogate BRIGHT, before whom the evidence was taken, died before rendering his decision, and by stipulation of all parties the case was submitted to Surrogate BENTLEY, who upheld the validity of said instrument.

On the 10th day of December, 1894, a petition was filed by the contestants asking that said decree of probate be revoked, alleging, as a basis for such relief, that said instrument was not the last will and testament of Martha B. Halbert; that said Martha B. Halbert was not, at the time of making, subscribing, or declaring said instrument, of sound mind and memory; that said witness did not sign said will at the request of decedent; that the execution of said instrument was obtained by fraud and undue influence; and that it was not sufficiently proved before the Surrogate's Court when admitted to probate.

The taking of evidence in respect to the matters set forth in said petition was begun before the present surrogate on the 14th day of February, 1895. Many hearings were had, and considerable time was necessarily consumed by respective counsel in the preparation and trial of said case.

The record is voluminous, comprising nearly 1,800 pages of printed matter.

Decedent's first husband was John F. Batchelor, who died in 1878, and in 1880 she married Horace Halbert, who died in 1887.

Testatrix was born October 9, 1821, and died June 22, 1892.

The will was dated and executed May 10, 1889. At the

time of the execution of the instrument in question she was, therefore, in her sixty-eighth year.

For convenience, the petitioners in this proceeding, who were the contestants in the former one, may be designated as contestants and the answering party as proponent.

Beyond contradiction, the decedent had been for many years a slave to the use of intoxicants. She was always irritable and eccentric. In her younger days she was particular in her personal appearance, and proper in conversation. As the years advanced there was a noticeable change, until, in the latter part of her life, she manifested little interest in the care of her home, and was often vulgar in talk and immodest in her acts.

Many witnesses were called by contestants, who described acts and repeated conversations tending to establish irrationality on her part, but almost invariably there was associated with this evidence a statement that she was either drunk or had been drinking.

Standing apart from the temporary effect of intoxicants, her acts and conversations would indicate mental aberration or, perhaps, symptoms of a diseased mind.

No precise rule can be laid down by which testamentary capacity can be measured. In the execution of deeds, mortgages, contracts and instruments of like character, there are at least two parties whose minds and energies are antagonistic. A will, when voluntarily executed, is the act of one person, uninfluenced and uncombated by any other agency, and therefore the decisions are that less mental capacity is required to execute a will than any other legal instrument.

Eccentricities, religious beliefs, peculiarities, and even impairment of the mind, do not render one incompetent to execute a will. The expression "sound mind" does not mean, in the execution of a will, that one must possess a perfect intelligence. It is the degree of intelligence that determines and controls.

It is easy to distinguish between a sound mind and the condition of a maniac, but there is some difficulty in determining

testamentary capacity where there is the presence of a manifest change in one's mind, amounting to aberration or impairment, attributable, perhaps, to thoughts on certain subjects or fancies, or occasioned by grief, illness and causes of a similar nature.

A monomaniac may have capacity to make a will, the theory being that, as to one subject, he is insane, as to all others sane. *Matter of Forman's Will*, 54 Barb. 274. That an aged person is forgetful, and at all times labors under slight delusions, does not, *per se*, establish testamentary incapacity. *Children's Aid Society v. Loveridge*, 70 N. Y. 389. There is no presumption of incapacity by reason of the advanced age of testator. *Horn v. Pullman*, 72 N. Y. 269.

It must be conceded that the constant use of intoxicating drink will impair the mind, and may ultimately render one incapable to execute an instrument testamentary in character.

But the most pronounced drunkards have times when they are sober, and have perfectly lucid intervals, and every act performed at such times is legal and binding. Their deranged condition of mind is transitory, and is not unlike that arising from certain kinds of illness.

Drunkenness may cloud the intellect for the time, but reason returns when the exciting cause has disappeared.

Peck v. Cary, 27 N. Y. 9, a case often cited, was where the will of a confirmed drunkard was established, though executed after a protracted debauch, and he had drunk several times during the day of its execution.

In *Van Wyck v. Brasher*, 81 N. Y. 260, it was held that an habitual drunkard was not incompetent to execute a deed. To render him incompetent, there must be proof that, at the time of the execution, he was in a state of actual intoxication. In *Matter of Johnson*, 7 Misc. Rep. 220, it appeared that testator had been addicted to the use of intoxicating liquors for many years, had suffered delirium tremens, was an inmate of an inebriate asylum, and shortly before the execution of his will had fallen into an epileptic fit; yet it was held he had testamentary capacity, and his will was admitted to probate.

In Matter of Reed, 2 Connolly, 403, the testator had been adjudged by a jury an habitual drunkard. He had been committed to a State asylum for the insane, where he remained about eleven months, then released on probation, but was recommitted, then released, and his drinking habit continued. It was held that these facts failed to establish mental incompetency, and the will was admitted to probate.

The rule drawn from many decisions of our courts is that, if one can comprehend the act he performs, knows the persons who are the subjects of his bounty, understands the nature and extent of his property, is able to retain these matters in his mind during the execution, and the testamentary act is free from delusions, he is competent to make a legal will.

More than thirty witnesses testified to numerous things said and done by decedent when sober, and gave detailed statements of many business transactions in which she was engaged, and in which she took an active and rational part.

The witnesses for contestants, most of whom were frank in statements and honest in convictions, have failed to establish that the testatrix, when free from the immediate influence of strong drink, was insane, or there was such an impairment of the mind as would render her incompetent to execute the will in question.

Their principal witness, Mrs. Humphrey, testified that, a number of times, she was with decedent when they talked about the current news of the day, social matters, newspaper topics, and discussed different subjects; that she rode with her summer and winter, and when at the house of decedent, she showed her relics, consisting of jewelry, china and pictures that she had brought from England. These visits continued to shortly before her death. The decedent was evidently sober during these times.

On March 6, 1889, about two months before the execution of this will, an action was tried in the Supreme Court before a referee, decedent being the plaintiff, wherein she sought to

recover damages for an alleged trespass, and asked for an injunction restraining defendant from using a certain driveway. The referee was called by proponent, and testified to what took place before him, and detailed evidence which was given by decedent. She was examined by respective counsel, and no suggestion was offered by any one, at that time, as far as the evidence discloses, that she was mentally unable to engage in litigation.

It is incumbent upon the contestants to prove, not only that decedent had been intoxicated, or was usually intoxicated, but that she was so in fact at the very time the will was executed, or that her mind was so clouded by drink that she was incompetent to give expression to her real testamentary intentions. *Peck v. Cary*, 27 N. Y. 9; *Van Wyck v. Brasher*, 81 N. Y. 260; *In re Johnson*, 7 Misc. Rep. 220; *In re Reed*, 2 Connolly, 403; *Andress v. Weller*, 2 Green's Ch. (N. J.), 608; *Lee's Case*, 46 N. J. Eq. 193.

Upon this proposition we have the testimony of five persons who saw the decedent the day the will was executed, and of Dr. Ford, who saw her more than twenty-four hours after its execution. He had not seen her since the preceding March. His evidence upon the question of her actual intoxication between the hours of nine and ten on the evening of May 10th cannot have much weight in determining this question.

Mrs. Humphrey, for contestants, testified that she took the one o'clock car for Whitesboro, stopped in West Utica for about an hour, arriving at Mrs. Halbert's shortly after Dr. Ford had left, and, according to her testimony, decedent must have been in a drunken stupor, although able to converse with the witness. In the former trial, from her evidence, she was at Mrs. Halbert's either at the time or before Dr. Ford was there; that she had told this occurrence numberless times, and yet, upon this trial, her testimony was materially changed in reference to the time of her arrival at decedent's house.

It must be held, from her entire evidence, that, if she was there, it was at the time testified to by her in the former trial. Her recollection as to material things must have been better at that time than it was after an elapse of nearly three years. Her interest in behalf of contestants was undisguised.

Dr. Ford, as far as the evidence discloses, was the last person who saw the decedent until the evening of that day. He testifies that he knew the decedent for many years, noticed her increasing drunkenness, and the deterioration which goes with constant drink. He saw her in her own house in a state of intoxication, and met her on the streets when she was in the same condition, and the deterioration of her mind manifested itself in her appearance, manner of dress and talk, and especially in her housekeeping. He was at the house of decedent between half-past two and three o'clock in the afternoon of May 10th. She was garrulous, but did not manifest in any other way that she had been drinking, and was able to walk up and down stairs. In his judgment, she was incompetent to make a will that day, although, if sober, she might have been competent; but, as a matter of fact, he did not remember much about how he found her, which statement he also made in the former trial.

From his entire evidence, there is nothing on which to base the proposition that she was insane, or, when sober, that her mind was so impaired that she was not master of her faculties as far as a testamentary act was concerned.

In answer to the question put by the court, "Did you find anything the matter with her except alcoholism on the first day?" he answered, "That is about all. I think there was a slight cold." His observation was made many hours before her will was executed. It is not an unusual occurrence that one addicted to the use of drink may be somewhat under its influence, and in seven hours after be able to transact ordinary business.

This evidence, in its entirety, fails to establish that decedent

was drunk on the evening of May 10th, especially when contradicted by direct and positive testimony.

Rebutting the idea of her being intoxicated is testimony of three witnesses for proponent, who were present when the will was executed. In the morning of May 10th Mr. Patten, the attorney who drew the will, was at the house of decedent, and there made a memorandum from which, during the day, he drew this will; and, according to his testimony, she was perfectly sober that morning, and during the evening, between nine and ten o'clock, when the will was executed, there was no indication of her being drunk; and, while there, she did not drink.

Messrs. Jones and Miller, the subscribing witnesses, were there for about an hour, and detailed conversations had with decedent, described quite minutely what took place preceding and at the execution of the will, all the statutory requirements being complied with, and gave convincing testimony that she was sober, did not drink when they were present, and that the act performed by her was free and voluntary. As far as the evidence discloses they have no pecuniary interest in sustaining this will, and their evidence must be given great weight in determining this controversy. If decedent was drunk when this will was executed, then three reputable witnesses, in order to render valid this instrument, which is apparently signed by a steady hand, have committed willful perjury. This evidence does not warrant such a conclusion.

It must be held that, at the time of this execution, she was not under the influence of intoxicating liquor and was able to dispose of her property by a testamentary instrument.

Another ground urged by contestants is that this will should be set aside by reason of undue influence exerted upon decedent by Thomas Kirk, who was her coachman, and who is made her residuary legatee. It appears he had been in her employ for a few years, and was, no doubt, anxious and interested as to the manner in which decedent would dispose of her estate.

She apparently preferred his company to that of any other person. They had been seen together when drunk, and on different occasions he was abusive and disrespectful. He advised, on several occasions, as to collecting money; paying bills, and making certain purchases. She declared that she would do well by him, and that the Batchelors and some of her kindred would not receive any of her money.

Influence, in order to vitiate a testamentary act, must be undue. It is not undue if it is a reasonable argument, suggestion, advice, persuasion, or urging one's personal claims upon the bounty of another. Undue influence has been described as that "which overpowers the will without convincing the judgment." It must be an influence which is exerted by fraud and coercion, and not that which arises through affection, gratitude, or feelings of like character.

Many wills have been sustained where one's own family have been disinherited.

From the evidence there is nothing to show that Kirk talked with Patten as to the preparation of this will, and he was not present at its execution. If Mrs. Halbert did not wish to have him enjoy her property, she could easily have executed another will.

Applying the principles of our well-settled decisions, the evidence fails to establish that this instrument was obtained by fraud, or that undue influence was exerted over the mind of the testatrix. *Matter of Snelling*, 136 N. Y. 515; *Brick v. Brick*, 66 id. 144; *Cudney v. Cudney*, 68 id. 148; *Marx v. McGlynn*, 88 id. 357.

Some evidence was given in reference to the religious belief of decedent. For many years she had been a Spiritualist, and had done many things consistent with the teachings of Spiritualism. She visited the cemetery, and communed with the spirits of her deceased husbands; set apart a bedroom for them, in order that they might have a place to rest when they visited her; placed at the table a sufficient number of plates for them;

and did numerous other things attributable, from this evidence, to her belief.

We are not to treat Spiritualism theologically, but legally, in its application to the testamentary capacity of the testatrix. It matters not as to what our individual opinion may be as to facts, formalities or claims of Spiritualism. That has nothing to do with this case. There is no evidence that decedent did things other than those which are understood to be the result of the teachings of Spiritualism. There was no delusion, which was the result of her belief, which entered into the execution or preparation of this instrument. It is well settled that believers in this faith, when testamentary capacity is in question, must be considered in the same light as those who take part in any other religious ceremony. *Keeler v. Keeler*, 20 St. Rep. 439; *Matter of Vanderbilt*, 3 Redf. 384; *Matter of Vedder*, 14 St. Rep. 470.

The foregoing conclusions lead to the conviction that the decree heretofore entered admitting said last will and testament to probate was proper, and should, therefore, be confirmed.

Decreed accordingly.

Note.—Testamentary incapacity will not be presumed because of advanced age. (*Matter of Henry*, 18 Misc. Rep. 149; *Matter of Harris*, 19 id. 388; *Matter of Hurlbut*, 26 id. 461.)

Nor because of feeble condition of mind or body. (*Dobie v. Armstrong*, 160 N. Y. 584; *Matter of Dixon*, 42 App. Div. 481; *Matter of Iredale*, 53 id. 45; *Matter of Hawley*, 44 Misc. Rep. 186.)

A will made during a period of sobriety, where it is shown that testatrix was rational and intelligent when sober, will be sustained. (*Matter of Hewitt*, 31 Misc. Rep. 81.)

In the Matter of the Will of JENNIE CARLAND, Deceased.

(*Surrogate's Court, New York County, Filed December, 1895.*)

1. WILL—UNDUE INFLUENCE.

Where the natural objects of a testator's bounty have been ignored, and the will is presented for probate by a stranger, who is the sole beneficiary, he must show that it represents the free and unconstrained wish of the testator, and that there were good reasons for the disinheritance of kindred.

2. SAME.

A minor who had long been an invalid gave, by her will, all her estate to her aunt, who was her guardian, to the exclusion of her brother. The aunt was present when the will was executed, and it appeared that she had misappropriated funds of the minor's estate, which the court had ordered advanced for specific purposes. *Held*, that the facts showed the exercise of undue influence.

Probate of will.

O'Shaughnessy & Kelly, for proponent; Henry F. Miller, for contestant.

FITZGERALD, S.—Jennie Carland, the decedent, was an orphan. She had barely reached the age when a minor can make a legal bequest of personal property. By the instrument propounded she gives her whole estate to Mrs. Platt, her aunt by marriage, and the guardian of her person, and with whom she was living. The claims of her brother, her only next-of-kin, were not only ignored, but in the paper is contained the unusual statement that, in making the will, she had taken into consideration her brother, George, and her aunt, Mrs. Nettie Watts, and, as they were entitled to nothing from her because of their cruel and unkind treatment of her, she had made the devise and bequest to Mrs. Platt, because Mrs. Platt had given her a good home, kind treatment, motherly care and nursing during her long and protracted illness.

The language quoted is, doubtless, that of the scrivener, in which the decedent probably acquiesced, but such a statement is not competent evidence of the fact. It is only admissible as showing her feelings towards the persons named.

Mrs. Watts was produced as a witness for the contestant, and she denied that she had been guilty of cruel or unkind treatment of the deceased. The brother was not called. He would have been competent to either affirm, deny or explain the statement of his alleged cruel and unkind treatment. But it was shown that, immediately after the execution of the paper, he and his sister were engaged in conversation, and were playing cards together. Other witnesses testified that in many years they had never seen any evidence of an unfriendly spirit between the brother and sister.

It is certain that she was and had been for some time an invalid, and about ten weeks after the execution of the paper she died. One witness, in describing her, states that he had a "pity for the poor little girl." Another, Mr. Heyman, a subscribing witness, testified that "she was quiet and passive." Still another, Mr. Cohn, the draftsman of the will, states that she looked like a girl of fourteen or fifteen, not matured; that she was thin, wasted, pale and languid, with no life or vigor about her, for she was perfectly passive.

Mr. Cohn's testimony is open to criticism because, with this view expressed of the girl's weak condition, he, an intelligent attorney, received the instructions for the preparation of the instrument in which the guardian was made the sole beneficiary, superintended its execution, and became a subscribing witness thereto. But many of the facts testified to by him are corroborated by the testimony of other witnesses; and, by the circumstances showing the origin and execution of the paper, I cannot but conclude that the girl was in a weak mental and physical condition, and could be easily influenced by a dominating mind, and, on all the evidence, I am satisfied that Mrs. Platt was the active directing mind in causing the preparation and execution of the paper.

She certainly had both motive and opportunity for diverting to herself the estate of her ward. She did not even wait for the death of her niece to begin to vest it in herself. A petition was filed by the ward setting forth that it was necessary for her health that she go to a warmer climate, that she have carriage rides, and a belief that the guardian would spend the money judiciously for the benefit of her health. On these representations, an order was entered that \$500 be advanced to the guardian out of the estate. But the order was coupled with a condition that the guardian was to expend the same, or as much as would be therefor required, for the purposes stated in the petition, "and not otherwise." The good faith of Mrs. Platt may well be questioned when it appears that out of the sum \$50 was paid to the attorney for drawing the will, and \$150 in the purchase of a ring for the ward, and that the balance was deposited by the guardian to her own credit in a savings bank, though this fact was reluctantly admitted. This was a clear violation, not only of the spirit, but of the letter, of the direction of this court.

When, under a will, the natural objects of a testator's bounty are ignored, and a stranger who is the sole beneficiary presents the paper for probate, he should come into court prepared to show that it represents the free and unconstrained wishes of the testator, and that there were good reasons moving for the disinheritance of kindred, for such a paper "is viewed with great suspicion by the law, and some proof should be required besides the factum of the will before it can be sustained." *Marx v. McGlynn*, 88 N. Y. 370. "When the guardian has been at all instrumental in procuring the execution of the will, the law presumes undue influence by reason of the confidential relation existing between the guardian and ward. And the guardian who proposes such acts must go beyond the mere formal execution of the paper, and show the act to have been the act of a voluntary, capable and understanding testator." *Limburger v. Rauch*, 2 Abb. Prac. (N. S.) 279.

The contest of the will of Fanny Bosch, reported under the title of *Seiter v. Straub*, 1 Dem. 264, has many features similar to the one now under consideration. In that proceeding, Surrogate ROLLINS made an able presentation of the law applicable to such cases, and it may be referred to with profit. Probate was denied, and the matter was never appealed.

It is often difficult to determine the existence of undue influence when it is not made manifest by threats or physical coercion. But in *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387, Judge MILLER presents a lucid definition. He says that, to avoid a will on the ground of undue influence, "it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection, the desire of gratifying the wishes of another, the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity or by a silent resistless power, which the strong will often exercises over the weak and infirm; and which could not be resisted, so that the motive was tantamount to force or fear." In this case, Mrs. Platt, the guardian, had doubtless been kind to her ward; yet, for all she did do, she has been amply paid out of the ward's estate. Not satisfied with this, she anticipated a portion of the testamentary benefaction by taking possession of \$450 which this court had ordered to be advanced for specific uses for the benefit of her ward, and diverted it to other uses.

On all the proofs, I am satisfied that the will was the result of undue influence "exerted by a strong will over a sick young girl." In this view I will sign a decree denying probate.

Probate denied.

In the Matter of the Will of NELSON B. GREGORY, Deceased.

(Surrogate's Court, Otsego County, Filed January, 1896.)

WILL—REVOCATION—ADOPTION.

Adoption of a child does not operate as a revocation of a prior will of the adopting party.

Proceedings for probate of will.

D. P. Loomis, Edwin D. Wagner and Stephen S. Gregory, for proponents; C. T. Brewer (Emmett R. Olcott, of counsel), special guardian, for Jeannie Marie Nellie Genin Gregory, contestant.

ARNOLD, S.—A paper writing is here offered for probate as the last will and testament of Nelson B. Gregory, deceased. It was duly executed on the 27th day of June, 1889, and devises and bequeaths all the testator's property to his brothers and sisters, nephews and nieces.

The contestant is the adopted daughter of the testator. She is not named in the will, and no provision has been made for her in any way by the testator. All of the facts in this case fully appear in a former decision of this court. *Matter of Gregory*, 13 Misc. Rep. 363.

The contestant was duly adopted by testator on the 23d day of July, 1894. He died on the 23d day of September, 1894. Her special guardian here contends that the effect of this adoption was to revoke the will, or at least to render it inoperative. The Revised Statutes of this State provide the ways in which wills shall be canceled or revoked. See 2 R. S. 64, sections 42, 43, 49.

None of the provisions of the Revised Statutes aid contestant in her contention. She must rely entirely upon chapter 830 of the Laws of 1873, as amended by chapter 703 of the Laws of 1887. Section 10 of the above Act reads as follows: "A child,

when adopted, shall take the name of the person adopting, and the two henceforth shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation [including] the right of inheritance, and the heirs and next of kin of the child so adopted shall be the same as if the said child was the legitimate child of the person adopting, excepting that as respects the passing and limitation over of real and personal property, under and by deeds, conveyances, wills, devises and trusts, dependent upon the person adopting dying without heirs, said child adopted shall not be deemed to sustain the legal relation of child to the person so adopting so as to defeat the rights of remaindermen, and in case of the death of the person so adopted the person so adopting as above provided shall, for the purpose of inheritance, sustain the relation of parent to the person so adopted."

By this Act the legal effect of an adoption in this State now is to put the person adopting and the child adopted in the relation of parent and child, accompanied by all the legal consequences of that relationship.

Saving the exception noted in the section of the above quoted as to the passing of property dependent upon the person adopting dying without heirs, the contestant, by this adoption, was placed in exactly the same position as though she were the child of Nelson B. Gregory, born in lawful wedlock.

She was not given by this Act the rights of an after-born child under the statute, but she was given all the other rights of a child. She had the same right of inheritance as a legitimate child of the person so adopting, and no greater.

Suppose that Dr. Gregory, at the time of adopting contestant, had had a legitimate child, who was born before the making of this will, this will would at his death, if unrevoked, have cut off the rights of such legitimate child in his property. It works the same result with the adopted child. The right of inheritance of an adopted child is like that of any other child or heir, subject to the testamentary power of the adopting parent. Austin

v. Davis, 128 Ind. 472; Davis v. Fogle, 124 id. 41; Davis v. King, 89 N. C. 441.

A will made either before or after the adoption must be admitted to probate.

The court, before it could make an order of adoption, was required to be satisfied that the moral and temporal interests of the child would be promoted by adoption. The intent of the law was that the adoption should work an advantage to the child, and such was, doubtless, the intent of Dr. Gregory; but, before anything was done to effectuate this, death visited him, and this will was left in existence.

The circumstances in this case lead me to express the hope that the persons receiving the benefits given by this will will remember that this contestant is the natural daughter, as well as the adopted daughter, of decedent, and that they may be led to give to her some portion of that which the law cannot give. The will must be admitted to probate.

Decreed accordingly.

In the Matter of the Estate of CALVIN S. STOWELL, Deceased.

(*Surrogate's Court, Cattaraugus County, Filed January, 1896.*)

SALE OF REAL ESTATE—COSTS OF SUITS NOT TO BE ALLOWED.

Costs recovered in an action against the surviving partner of the decedent upon a firm indebtedness cannot be allowed in a proceeding for the sale of real estate for the payment of debts.

Proceedings for the disposition of real estate for payment of debts.

Carey, Rumsey & Hastings, for petitioner; John J. Inmann, for Frank Holdridge, creditor; John C. Leggett, for Ackley and others, creditors.

DAVIE, S.—The decedent died, intestate, August 4, 1892. On the 22d day of the same month letters of administration upon his estate were granted to the petitioner, who filed his petition in this proceeding on the 22d day of June, 1895. The facts required by section 2759 of the Code of Civil Procedure to be shown preliminary to the making of a decree have been satisfactorily established. The only controversy which arises relates simply to the demands of the creditors who appear, and necessitates the determination of a single proposition.

The decedent, at the time of his death, was a copartner with one Corbin. On the 16th day of October, 1894, the creditors Ackley, Sill & Co. recovered a judgment in the Supreme Court against Corbin, as surviving partner, for the sum of \$198.36 damages and \$70.60 costs. On the 31st day of December, 1895, the creditor Holdridge recovered a judgment in the same court against Corbin, as such surviving partner, for the sum of \$226.52 damages and \$349.11 costs; and the execution issued thereon was returned wholly unsatisfied. It is conceded that the damages established by each of these judgments are proper claims to be allowed in this proceeding; but it is urged on the part of the petitioner that the costs of such actions, having accrued since the death of decedent, cannot be satisfied from the moneys derived through the instrumentality of this proceeding.

The suggestion is made on behalf of these creditors that in consequence of the insolvency of the surviving partner and the insufficiency of personal assets of the estate, if the costs, which have evidently been incurred in the enforcement of valid claims against the firm of Corbin & Stowell, are not to be adjusted in this proceeding, the claimants are left entirely remediless so far as such costs are concerned. This suggestion would not be without force if the determination of the rights of these creditors was a matter addressed to any extent to the discretion of the court; but such is not the case. Under the provisions of the statute authorizing the disposition of decedent's real estate for

payment of debts and the construction placed thereon by the courts, no part of these costs can be allowed.

The title to real estate upon the death of the owner intestate vests immediately in the heir. It can be taken for the payment of debts only by virtue of the statute, and the statutory provisions must be strictly pursued. *Kingsland v. Murray*, 133 N. Y. 170. At common law, lands descended were not chargeable with the simple contract debts of the ancestor, nor was the heir liable upon specialty unless he was expressly named (3 Bl. Comm. 430); but by laws 1786, chapter 27, such real estate was made liable to some extent for the payment of debts in case of insufficiency of personal assets; and probate courts were given authority to direct sale of such real estate upon certain conditions for that purpose. In 1801 and 1813 this liability was further extended and defined. Various provisions for the enforcement of this liability were incorporated in the Revised Statutes and the Code. *Read v. Patterson*, 134 N. Y. 131. By the terms of the original statute the disposition of real estate was authorized through proceedings in probate courts solely for the payment of the debts of decedent. By a subsequent provision this remedy was extended to funeral expenses; and, by the amendment of 1894, it was so extended as to authorize the proceedings for the payment of judgment liens existing at the time of the decedent's death. Code Civ. Proc. sec. 2749.

So it may be asserted with some degree of reason that, inasmuch as these various statutory provisions are to some extent in derogation of the rights of the heir at common law, the creditor seeking to avail himself of the benefits conferred should clearly show that his application comes within the intent and purview of the statute. The demands of these creditors not being for "funeral expenses," nor for a "judgment lien existing at the death of the decedent," it only remains to be determined whether the costs in the action against the surviving partner can be regarded as the debt of the decedent, within the meaning of the statute.

In *Wood v. Byington*, 2 Barb. Ch. 387, the chancellor, in his opinion, says: "The Act of April, 1843, does not charge the real estate with the costs of the suit in which the judgment or decree against the personal representatives is obtained, but merely makes the judgment or decree presumptive evidence of the existence and the amount of the debt due from the testator."

Under the provisions of the Revised Statutes (6th Ed.), p. 108, authorizing the disposition of decedent's real estate "to pay his debts and funeral expenses," it was held that the effect of the statute was to limit such authority to cases of debts existing against the decedent in his lifetime, exclusive of costs incurred subsequent to his death in proceedings to enforce collection of such debts. *Wood v. Byington*, *supra*; *Sanford v. Granger*, 12 Barb. 392; *Ball v. Miller*, 17 How. Prac. 300.

In *Hurd v. Callahan*, 9 Abb. N. C. 374, Surrogate Coffin says: "It has been repeatedly decided that the real estate of deceased persons can only be sold in a proceeding like this to pay their debts, and that the costs of actions brought against the executor or administrator to recover them are no part of such debts. This is undoubtedly the law."

The same conclusion was reached in *Matter of Peck*, 3 Redf. 345.

The present statute provides that: "Where a judgment or decree has been rendered against an executor or administrator for a debt due from the decedent, the debt is, nevertheless, deemed a debt of the decedent to the same extent, and to be established in the same manner, and, except as prescribed in the next section, subject to the same defenses, as if an action had not been brought." Code Civ. Proc. sec. 2756.

The exception referred to in the section quoted is as follows: "The debt for which the judgment was rendered cannot be allowed as against the property in question at any greater sum than the amount recovered, exclusive of costs." Code Civ. Proc. sec. 2757, subd. 1.

If costs duly recovered against a personal representative upon

a claim due from the decedent are not to be regarded as a debt of the decedent within the meaning of the statute, then much less can costs recovered in an action against the surviving partner of such decedent be allowed in proceedings like this.

While none of the decisions above cited are directly in point, they all indicate a disposition on the part of the courts to limit the recovery in such proceedings to the amount actually owed by the decedent at the time of his death.

Ordered accordingly.

Note.—The face of a judgment recovered against the administrator may be paid from the proceeds of sale, but not referee's fees or disbursements. (*Matter of Summers*, 37 Misc. Rep. 575.)

A judgment against the executor for costs, recovered in an action continued by him, the greater part of which accrued after his testator's death, is not a debt of the decedent, and his real estate cannot be sold to pay it. (*Matter of Foley*, 39 App. Div. 248.)

In the Matter of the Will of ABBY E. LAYTIN, Deceased.

(*Surrogate's Court, New York County, Filed January, 1896.*)

1. WILL—REVOCATION.

A proceeding to revoke probate is instituted by the filing of the petition within the statutory time, and citations may issue thereafter from time to time to bring in necessary parties.

2. SAME—NEGLECT TO PROCEED.

Neglect of the petitioner to proceed further after filing the petition is not ground for dismissal, as the executor may, in such case, apply for citations.

Application by the surviving executor to dismiss a proceeding for the revocation of probate.

S. M. & D. E. Meeker, for executor; Thos. W. Fitzgerald, for petitioners.

ARNOLD, S.—This is an application on the part of the surviving executor of the will to dismiss a proceeding for revocation of the probate thereof.

The petitioners in the latter proceeding filed their petition on the last day allowed for that purpose by section 2648 of the Code, and certain persons and corporations were therein stated to be legatees named in the will, and a citation to such parties and to the surviving executor of the deceased, as required by section 2649 of the Code, was accordingly issued, and served upon several of them. Three of the persons so named in the citation had, however, died prior to the filing of the petition, and their personal representatives were not, as such, cited, as provided in the last mentioned section. One other party named in the citation was not served with the same, she having removed from the State.

On the return of the citation a motion was made on the part of the executor of the will to dismiss the proceeding, upon the ground that the petition was filed too late; that the citation should have been served upon all parties required by law to be cited within sixty days after the petition was filed, and that this had not been done. This motion was denied, upon the authority of *Matter of Gouraud*, 95 N. Y. 256; but the petitioners were admonished to proceed diligently to bring in the omitted parties. No order was entered on this decision, but, four weeks after it was announced, the petitioners obtained an order for a supplemental citation directed to such persons, but no such citation was then or has since been taken out, and those parties have not been brought into this proceeding.

The present motion to dismiss the proceeding was made after two months had elapsed from the time this supplemental citation was ordered, and upon the ground of laches on the part of the petitioners in not bringing in these additional parties. Sup-

plemental citations are alleged by such petitioners to have been issued to two other persons not served with the original citation, or not named therein; but such citations have not been returned to this office, nor have any proofs of service of same been filed. The petitioners have failed to bring all necessary parties before the court, and if that fact could afford sufficient ground for granting this application I should be disposed to grant it; but the language of the Court of Appeals in *Matter of Gouraud*, *supra*, seems clearly to hold that, if the petition for revocation of probate is filed within the time limited by law, the contest is then instituted, and that citations may issue at any time, or from time to time thereafter, to the necessary parties; and it is the duty of the Surrogate to issue the same (Code, sec. 2481, subd. 2), and, before proceeding upon the petition, to adjourn the hearing until all necessary parties are cited, notified or appear. If the petitioner does not make the necessary application, the executor, if he desires the allegations of the petition to be disposed of, can have the proper citations issued. In effect the mere failure of the petitioner to proceed further after filing the petition does not make the petition of no effect, or afford ground for its dismissal. I am therefore constrained to hold that I cannot dismiss the proceeding in its present stage.

Application denied.

In the Matter of the Estate of JOHANNA LICHTENSTEIN,
Deceased.

(Surrogate's Court, New York County, Filed January, 1896.)

SALE OF REAL ESTATE.

A decree for the sale of real estate for the payment of debts cannot be made without proof of the facts required by the statute to be shown, although the application is not opposed.

Application for the sale of real estate for the payment of debts.

Steinhardt & Goldman, for petitioner; Rose & Putzel, for executors.

ARNOLD, S.—The question which was suggested to counsel in this matter was not as to whether the petition contained the necessary allegations giving this court jurisdiction to issue citations to the necessary parties to the proceeding, but whether certain allegations therein made (and which, as the petitioner applies as a creditor only, were unnecessary to be made a part of the petition, under section 2752, subd. 4, Code), if true, would not render the proceedings futile, the present application being for a decree under section 2759, Code. Whether proceedings for the sale of the real estate of a decedent to pay debts are instituted by a creditor or by an executor or administrator, before a decree can be made for such sale proof must be made as provided in subdivision 5 of the last named section. The petition herein states that all the personal property of the testatrix has been applied by her executor to the payment of her funeral expenses, and the excess thereof, if any, paid over to her children as legatees under her will. Of course, if there was no excess, a deficiency of personal assets necessary to pay debts would be shown; if, on the contrary, such excess existed, and it was distributed among the legatees, a question would then arise

as to whether the proof required by section 2759, subd. 5, could be made. In *Kingsland v. Murray*, 133 N. Y. 170, which was a proceeding instituted by an administratrix *de bonis non* for the sale of real estate to pay debts, it appeared that the decedent left personal property in excess of his debts, which came into the hands of the original administrator, who was the son and only heir at law of the intestate, and for which he had never accounted. His letters had been revoked, and the petitioner appointed in his place. The Court, at page 174, referring to the provision of the Code last above mentioned, says: "There seems to be some difference of opinion between the Surrogate and the General Term as to the scope and meaning of this provision. We think the meaning is reasonably free from doubt. If the decedent, at the time of his death, left sufficient personal property which could have been applied to the payment of his debts and funeral expenses in the exercise of reasonable diligence on the part of his executors or administrators, then resort cannot be had to the statutes for the sale of his real estate for the payment of his debts. In that event the personal property is the fund for the payment of his debts, and the creditors must resort to that through the executors or administrators. If they waste or squander the personal property, so that it becomes insufficient for the payment of the debts, the only resort for the creditor is to them, to enforce their personal responsibility; and they cannot in that case cause the real estate to be sold under the statutes referred to. . . . So, in the language of this section, before the Surrogate can make a decree for the sale of the real estate, the petitioner must establish that all the personal property of the decedent which could have been applied to the payment of the decedent's debts and funeral expenses has been so applied."

And it is further held that if the executors or administrators have proceeded with reasonable diligence in converting the personal property into money, and applying it to the payment of the debts and funeral expenses, and it is insufficient for the pay-

ment of the same, then, even if it has not all been so applied at the time of the petition, the Surrogate is authorized to make the decree; and at page 176 it is further said that under this construction of the statute an irresponsible executor or administrator may so waste and misappropriate the personal property of a decedent that none of it could be applied to the payment of his debts, and that thus a proceeding to sell the real estate could not be maintained, as it could not be shown that the executor or administrator had proceeded with reasonable diligence in converting and applying the personal property to the payment of debts, and there may, therefore, be cases, although rare, where the creditors may not be able to compel the sale of the real estate of the decedent for the payment of their debts under the provisions of the Code referred to; and the Court then proceeds to point out other remedies which creditors may have in such cases, among which is the right of action against the next of kin who have received any of the personal property. In the present case the petition shows that no publication of notice requiring creditors to present their claims has ever been made. Meanwhile the real estate has been conveyed by all the devisees but one to that one who has been cited, but neither opposes nor consents to the present application. Notwithstanding such default, however, the Surrogate must, before granting a decree of sale, have before him all the proofs required by the statute. The decision in *Kingsland v. Murray* does not draw any distinction between cases of executors and cases of administrators, but applies a general rule in respect to administration by either. In *Matter of Bingham*, 127 N. Y. 296, decided in the Second Division of the Court of Appeals, about a year earlier than the decision of *Kingsland v. Murray*, some general language is used at pages 309, 310, which appears to draw a distinction between cases of administrators who give bond and those where executors have squandered the personal property which came into their hands as such; but in that case it appeared that the personal property applicable to the payment of debts was not at any time

sufficient to make such payment in full. In the Kingsland case the administrator, who was also the only next of kin and heir at law, had appropriated the personalty to his own use; and in the present case the executor, who was a son and one of the devisees and heirs at law of the testatrix, divided the personalty between himself and his co-devisees. These two cases are, therefore, practically alike in their circumstances. The petitioner herein should have the opportunity of showing the amount of personalty which came to the executor's hands, the debts owing by the testatrix, and the disposition made of the personalty, so that it may be ascertained whether all of such personalty which could have been applied to the payment of decedent's debts has been so applied, or that the executor has proceeded with reasonable diligence in converting the personal property into money, and applying it to the payment of these debts and funeral expenses, and that it is insufficient for the payment of the same; and a reference is ordered to take proofs as to such matters required to be established by the decree prayed for herein, under section 2759 of the Code.

Ordered accordingly.

(Note as to sale of decedent's real estate for the payment of debts:)

Where the personal estate is insufficient to pay the debts, a creditor has a remedy by proceedings for the sale of the real estate. (Matter of Gill, 42 Misc. Rep. 457.)

Where the debts are not charged on the real estate, and the personal property is insufficient to pay them, the widow and executrix who pays them without taking assignments from the creditors is entitled to be subrogated to their rights and may maintain a proceeding for the sale of the realty to reimburse her. (Matter of O'Brien, 39 App. Div. 321.)

A sale of the realty cannot be had for payment of administration expenses alone or for debts incurred after decedent's death, except funeral expenses. (Matter of Quatlander, 29 Misc. Rep. 566.)

A power of sale "for any purpose that the executor, in his best judgment, may think proper" is not imperative, and does

not prevent proceedings to sell real estate for payment of debts. (Matter of Johnson, 18 App. Div. 371.)

Where sufficient personal property was left to pay debts, the fact that the executor misapplied it does not authorize the creditors to resort to the real estate. (Matter of Very, 24 Misc Rep. 139.)

Where a devisee dies after the lapse of three years, a creditor of the testator is entitled to be made a party to a proceeding to sell the land for the payment of the devisee's debts. (Matter of Fielding, 30 Misc. Rep. 700.)

The petition need not state the value of each parcel separately where they lie together. (Matter of Georgi, 35 Misc. Rep. 685.)

A creditor has no right to answer the petition. (Matter of Campbell, 66 App. Div. 478.)

To sustain the proceeding, it must be shown that the assets, when duly administered, would not pay the debts. (Matter of Meagley, 39 App. Div. 83.)

The real estate can be sold only to the extent that the personal property applicable to the payment of the debts was insufficient, although the administrator was insolvent. (Matter of Georgi, 21 Misc. Rep. 419.)

In the Matter of the Judicial Settlement of the Accounts of
ELIZA J. ARKENBURGH et al., as Executors of ROBERT
H. ARKENBURGH, Deceased.

(*Surrogate's Court, Rockland County, Filed January, 1896.*)

EXECUTORS—CONTEMPT.

An executor should not be punished for contempt in failing to comply with a decree, where he satisfies the court that an appeal will be taken which may result in a reversal or modification of the decree.

Motion to punish the executrix for contempt in refusing to comply with a decree of the Surrogate.

Robt. F. Little, for executor; Charles E. Souther, for executrix.

TOMPKINS, S.—The decree settling the account of the executor and executrix was made on the 30th day of December, 1895, after a prolonged contest and many delays in efforts to settle the decree after the decision was filed. Two accounts were filed—one by the executor and one by the executrix. Numerous objections were filed by legatees to items of the executor's account.

The decree directs payment of various amounts for costs, and on account of legacies. An order was made, during the contest over the account, requiring all moneys to be deposited in the Farmers' Loan & Trust Company, in the name of the estate, to be drawn only on orders or checks signed by both the executor and executrix. A certified copy of the decree was served upon the attorney for the executrix on the 2d day of January, 1896, and on the same day a like copy was personally served upon the executrix.

The executor, on the 3d day of January, requested the executrix to sign certain checks with which to pay certain amounts ordered to be paid by the decree. This the executrix refused to do. In brief, she refused to make or participate in any of the payments directed by the decree.

On the 6th day of January, 1896, the executor procured an order directing the executrix to show cause on the 9th day of January, 1896, why she should not unite with the executor in making payments required to be made by the decree, and why she should not comply with the decree, and why she should not be punished for her alleged contempt, etc.

The executrix, for answer to the motion, says that she has been informed that certain of the legatees, who were contestants on the accounting, intend to appeal from the decision of the Surrogate, and from the decree. In fact, the executrix alleges that she has been informed by counsel for some or one of the contestants that an appeal would be taken and perfected within the statutory time.

I think this is a sufficient answer to the motion.

An executor should not be compelled to comply with the

directions of a decree, where he is promptly advised that an appeal is to be taken, until at least a reasonable time is allowed within which to take and perfect such an appeal.

Here only three or four days elapsed between the service of the copy of the decree and the making of this motion. If an executor is satisfied, and satisfies the court, that an appeal will be taken which may result in a reversal of the decision of the Surrogate, or some part of it, and necessitate a modification of the decree, he should not be punished for contempt for failing to comply therewith until the time to appeal expires.

Of course, the Surrogate can compel compliance, but should not punish for contempt unless there is evidence of bad faith or a wilful refusal.

It might very easily and naturally occur that on a modification of the decree, if payments were now made under it, there might not be assets enough to comply with the decision of the appellate court. The executrix should not be forced into such a position, where she would be likely to suffer a personal loss, by an order of the court at this time.

There has been no wilful refusal on the part of the executrix to comply with the executor's request; hence she should not be punished. Nor should she be compelled to pay out moneys under the decree while she is satisfied that a timely appeal, in good faith, is to be taken.

Motion denied, with \$10 costs against the executor.

In the Matter of the Estate of JOHN MILLER, Deceased.

(*Surrogate's Court, Chautauqua County, Filed January, 1896.*)

1. EXECUTORS—ACCOUNTING—LIMITATION.

The right of legatees or next of kin to maintain a proceeding to compel an executor or administrator to account is barred by the statute of limitations at the expiration of six years from the time it accrued, viz.: one year and six months from the granting of letters.

2. SAME—PAYMENT.

A payment made to another than the moving party, in the absence of proof of the circumstances under which it was made, is insufficient to take the proceeding out of the statute.

3. SAME—ACKNOWLEDGMENT.

An unsigned statement of account showing a balance due to the executor or administrator does not constitute an acknowledgment or promise to pay which will prevent the operation of the statute.

4. SAME—ACTS OF EXECUTOR.

Acts of an executor or administrator in enforcing an obligation or liability to the estate will not prevent the running of the statute.

Proceeding to compel surviving administrator to render an account of his proceedings and distribute the remainder of decedent's estate among the next of kin.

The facts appear in the opinion.

Bootey, Fowler & Weeks, for petitioner; V. E. Peckham and J. B. Fisher, for administrator.

WOODBURY, S.—Letters of administration upon the estate of John Miller, deceased, were granted and issued by the Surrogate unto Elizabeth Miller and Harvey S. Elkins on the 13th day of November, 1875, who caused an inventory of the decedent's estate to be made and filed, as required by law. Subsequent to their appointment Elizabeth Miller died, and thereafter Mr. Elkins continued the administration of the estate. The administrator has never settled his accounts, and no account of his proceedings has ever been rendered to any court.

On the 21st day of March, 1895, Frank A. Crandall presented to this court his duly verified petition, alleging, in substance, the facts to which we have referred, and, further, that he is one of the next of kin of the deceased; that the personal property of the decedent amounted to \$18,144.44, as appears from the inventory filed by the administrators; that said property was amply sufficient to pay all debts, funeral charges and expenses of administration, and leave a large amount to be distributed among the next of kin; that, since the expiration of one year from the granting of letters, the petitioner has applied to the administrator to render an account of his proceedings, and distribute the moneys in his hands to the next of kin, which he alleges the administrator has neglected and refused to do—and praying that the administrator should be cited to show cause why he should not render an account of his proceedings and make such distribution.

Upon the return of the citation issued upon the petition, requiring the administrator to show cause why he should not render an account of his proceedings and distribute the remainder of the estate in his hands to the next of kin of the deceased, the administrator appeared and by written answer pleaded the statute of limitations as a defense and bar to the proceeding.

A motion was then made by the administrator for the dismissal of the proceeding. This motion was denied, and proofs were offered and received as bearing upon the question of the applicableness of the statute to the proceeding, and of facts and circumstances relied upon by the petitioner to take the proceedings out of the operation of the statute.

The only question which we are called upon to consider is, therefore, whether the remedy of the petitioner in this proceeding is barred by the statute of limitations.

Prior to the adoption of the Revised Statutes the rule was well established in the Court of Chancery that, in case where the jurisdiction at law and in equity were concurrent, a suit in equity must be commenced within the time limited for the com-

mencement of an action at law; in other words, the equitable remedy in a case of concurrent jurisdiction is subject to the same limitation as the legal. *Humbert v. Trinity Church*, 7 Paige, 195; *Story Eq. Jur. sec. 529*; *Souza v. De Mayer*, 2 Paige, 574; *Kane v. Bloodgood*, 7 Johns. Ch. 89; *Murry v. Coster*, 20 Johns. 576; *Humbert v. Trinity Church*, 24 Wend. 587; *Borst v. Corey*, 15 N. Y. 505.

A right of action was given by the Revised Statutes (sec. 9, tit. 5, chap. 6, pt. 2) to a legatee or next of kin, against the executor or administrator, to recover a legacy or distributive share. Section 1819 of the Code of Civil Procedure gives the same right of action, and it is a substitute for the provisions of the Revised Statutes. Section 382 of the Code of Civil Procedure provides that an action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument, must be commenced within six years after the cause of action accrues. This section acts as a substitute for section 18, title 2, chapter 4, part 3, of the Revised Statutes.

All the proceedings in Surrogate's Court are regarded as special proceedings within the meaning of the Code of Civil Procedure, and the rule of limitation prescribed by section 382 is, by force of the provisions of section 414, made applicable to such proceedings.

The provisions of the Revised Statutes do not alter or change the rule established in equity, but, on the contrary, make that rule apply with greater force by expressly giving a right of action to recover a legacy or distributive share.

It was not, however, until the adoption of the Code of Civil Procedure that there was a fixed statutory provision limiting the time of the commencement of a special proceeding to recover a legacy or distributive share.

Several of the cases to which we shall presently refer expressly, and others by necessary implication, hold that a special proceeding in a Surrogate's Court, against an executor or administrator, to compel an accounting and payment of a legacy

or distributive share is a proceeding to enforce an obligation or liability not arising on a judgment or sealed instrument; and, as section 414 of the Code applies to such proceeding, it would seem that the same rule of limitation must govern with respect thereto as would govern a right of action upon an obligation or liability as prescribed by section 382 of the Code.

It was accordingly held, under the provisions of the Revised Statutes, in accordance with the rule established in equity, and has since been held under the provisions of the Code of Civil Procedure, to which we have referred, that special proceedings in Surrogate's Court against an executor or administrator to enforce the payment of a legacy or distributive share, or an accounting, are barred by the statute of limitations if not commenced within six years from the time when the right accrued to compel such accounting or payment. *McCartee v. Camel*, 1 Barb. Ch. 455; *Clark v. Ford*, 1 Abb. Ct. App. Dec. 359; *Smith v. Remington*, 42 Barb. 75; *Clock v. Chadeagne*, 10 Hun, 97; *Cole v. Terpenning*, 25 id. 482; *Matter of Van Dyke*, 44 id. 394; *Matter of Dunham's Estate*, 6 N. Y. Supp. 563; *Matter of Underhill's Estate*, 9 id. 455; *Matter of Perry's Estate*, 15 id. 535.

The same doctrine has been recognized and reiterated in many other cases. *Am. Bib. Society v. Hebard*, 51 Barb. 552; 41 N. Y. 619; *Roup v. Bradner*, 19 Hun, 513; *Drake v. Wilkie*, 30 id. 537; *Matter of Latz*, 33 id. 618; *Matter of Miller*, 70 id. 61; *Zweigle v. Hohman*, 75 Hun, 378; *Loder v. Hatfield*, 71 N. Y. 92; *Butler v. Johnson*, 111 id. 204; *Matter of Gregory's Estate*, 4 N. Y. Supp. 235; *Matter of Clayton's Estate*, 5 id. 266; *Matter of Nichols*, 8 id. 7; *Matter of May*, 9 id. 755; *Matter of Post's Estate*, 44 id. 9; *Matter of Hodgman's Estate*, 10 id. 491; *Pitkin v. Wilcox*, 12 id. 322; *Matter of Stagg*, 6 Civ. Proc. R. 88; *Matter of Van Wert's Estate*, 3 Misc. Rep. 563.

This right accrued at the expiration of one year from the granting of letters (Code Civ. Proc. sec. 2726), or, at the out-

side, at the expiration of eighteen months therefrom (id. sec. 2727); and, inasmuch as upwards of nineteen years had elapsed from the time letters were issued to the administrator to the time of filing of the petition, it follows that the statute of limitations is a bar to this proceeding, unless, by some act on the part of the administrator, the case is taken out of the statute, or the provisions of the statute have been waived, or unless the rule established by the cases cited has been modified or changed by more recent and controlling decisions, or by the enactment of section 1819 of the Code of Civil Procedure.

The case of *Matter of Camp*, 126 N. Y. 377, is cited as authority for the proposition that the rule of limitations as laid down in the cases cited has been changed, or, at least, thereby rendered inapplicable to proceedings of this nature against an administrator, and that the rule to be applied in this proceeding should be the one applied in equity to trustees, viz., that the statute of limitations does not commence to run against the beneficiary until the trustee has openly, to the knowledge of the beneficiary, renounced, disclaimed or repudiated the trust. In that case the funds had come to the hands of a guardian, in which he held a life estate, and he had receipted therefor as guardian. Sixteen years after the ward became of age, but within one year after he became cognizant of the receipt of the money by the guardian, he instituted a proceeding to compel the guardian to account. The guardian interposed the statute of limitations as a defense.

The court, in deciding the question (PECKHAM, J., writing the opinion), says: "The guardian has obtained possession of the fund as guardian, and he deals with it not alone in his own right as life tenant in this case, but he also deals with it as the property of others confided to his care. In this sense he occupies the position of a trustee, so far as to prevent the running of any statute of limitation in his favor regarding the property intrusted to him. Although he may cease to be guardian upon the ward coming of age, yet, as long as the property remains in

his possession as guardian and unaccounted for, he must remain liable to account." It will be seen by a careful study of this case that the broad and sweeping language employed, carried to its logical conclusion, would bring every guardian within the rule applicable to trustees, to which we have called attention.

Whether the court intended this result, or whether it employed this language with respect to the peculiar circumstances of the case under consideration, it is not necessary for us to determine in disposing of the proceeding before us.

While the duties pertaining to the office of a guardian of property, and that of an executor or administrator, may not be materially different respecting matters of accounting and liability to account, and it may, with much plausible argument, be contended that the rule of limitation applicable to one is alike applicable to the other, and that such rule should be the one applied in equity to trustees, seemingly laid down in *Matter of Camp*, yet we are of the opinion that the court in that case did not intend to alter, modify or change the rule of limitation made applicable to proceedings to compel payment of a distributive share on an accounting by an executor or an administrator, established by a long and almost uniform line of decisions which we have cited. There is nothing in the language of the opinion which imports any such purpose, and no such intention should be presumed. This view of the case is strengthened by the fact that, in the case of *Butler v. Johnson*, 111 N. Y. 204, the Court of Appeals (in an opinion also written by PECKHAM, J.) recognized and reiterated the rule that the six years' statute of limitations would bar a proceeding in Surrogate's Court against an executrix to compel the payment of a legacy; and it seems to us that we would not be warranted in presuming that the court intended to overrule the doctrine there recognized, without even referring to it.

A careful study of the cases leads us to the conclusion that, while executors and administrators act in a fiduciary capacity, and are, in a general sense, trustees, as they deal with the prop-

erty of others, they are not to be regarded as falling within that class of trustees to which the rule of limitation contended for applies. It would seem that such a rule was intended to apply to an actual, express and subsisting trust. *Lammer v. Stoddard*, 103 N. Y. 672. The dicta in the cases of *Wood v. Brown*, 34 N. Y. 342, and *Matter of Hawley*, 104 N. Y. 261, support this view.

It has several times been urged in our appellate courts that the provisions incorporated into the statute by the adoption of section 1819 of the Code of Civil Procedure, which provides that, "for the purpose of computing the time within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled, and not before," has changed the rule of limitation governing special proceedings in Surrogate's Court of this nature. The opinions expressed by our judges upon the question have not been entirely harmonious. The section referred to relates exclusively to actions, and makes no reference to special proceedings instituted for the purposes mentioned. It will be observed, also, that this section does not change or alter the period of limitation, but only prescribes the time from whence it is to be computed. The weight of authority seems to be to the effect that the rule of limitation applied by that section to an action does not affect the rule of limitation applied to a special proceeding in Surrogate's Court, and that the six years' statute is still a bar to such proceedings. *Matter of Van Dyke*, *supra*; *Matter of Nicholls*, *supra*; *Matter of Dunham's Estate*, *supra*; *Matter of Underhill's Estate*, *supra*; *Matter of Perry's Estate*, *supra*.

It only remains for us to consider those acts of the administrator which are relied upon by the petitioner to prevent the operation of the statute.

On the 4th day of February, 1891, the administrator paid to Abbey Correll, one of the next of kin, \$100, but no evidence was offered showing the circumstances under which the payment

was made. This was but one of a series of payments by the administrator to the various next of kin, covering a period from the time of his appointment to the time of the payment of the \$100, aggregating nearly \$17,000; but none of the other payments were made within six years of the time of the filing of the petition. It is contended by counsel for the petitioner that this payment operated as an acknowledgment by the administrator of a liability which takes the proceeding out of the statute. We question very much whether such a payment, in a matter of this nature, can have that effect, in the absence of any evidence of the circumstances under which it was made. It is, however, in our opinion, a sufficient answer to the proposition that the payment was not made to the petitioner, nor is there any evidence showing that he was in any manner connected with it, or that it was intended to influence his action; neither was it made to his agent, nor to any one acting for him or in his interest, who might be expected to communicate it to him, so as to affect his conduct. It was made to a third party who is a stranger to this proceeding. Payments under such circumstances cannot be held to relieve the operation of the statute. *De Freest v. Warner*, 98 N. Y. 217; *Matter of Kendrick*, 107 N. Y. 104.

In 1893 the administrator prepared and furnished to each of the next of kin a typewritten statement of account of his proceedings. It is claimed that this amounts to a written acknowledgment, from which a promise to pay will be presumed, so as to prevent the operation of the statute.

We hold otherwise. This proceeding is to be regarded as one to enforce the payment of a distributive share; and the statement of account, which is unsigned, neither acknowledges a liability nor does it contain a promise to pay, but, on the contrary, it shows an indebtedness to the administrator. This account cannot, certainly, have any greater force and effect as an acknowledgment or promise than its contents and terms import. Again, it is contended that, inasmuch as the administrator has in such account credited himself with several items of ex-

penditures and disbursements incurred within the six years next preceding the filing of the petition, the operation of the statute is thereby prevented. We do not agree with this proposition. Such payments are neither acknowledgments, promises, nor part payments, within the meaning of the statute, to take the case out of its operation.

During the six years immediately preceding the commencement of this proceeding the administrator performed certain acts in his official capacity, and this fact is relied upon by counsel for petitioner to take the case out of the operation of the statute. It seems that one of these acts was the foreclosure of a mortgage upon real property, and that, upon the sale, the administrator became the purchaser of the property for \$150, and still holds it. It does not appear to whom the mortgage was given, or who gave it, or when or how it came to the hands of the administrator. The only evidence as to whom the mortgage was given was by the witness Colburn, who owned the equity of redemption in the land when the foreclosure took place. He testified that he thought it ran to the heirs of John Miller. If this is to be regarded as true, and we do not see how we can otherwise treat it under the evidence, it is difficult to understand what the administrator, as such, had to do with it. The fact that he foreclosed it as administrator could not affect the rights of the heirs as mortgagees, or their remedy against the land. Again, if he acted for them, and at their request, in the foreclosure of a mortgage owned by them, a remedy is doubtless open to them for such relief as they are entitled to; but, in the absence of any evidence, unless by strained presumption, showing that the mortgage was a part of the trust estate, we do not see why or how it can prevent the running of the statute.

We desire, however, to place our decision respecting this proposition squarely upon the ground that the acts of the administrator, performed within the six years preceding the commencement of this proceeding, do not operate to prevent the running of the statute.

The evidence does not show that the petitioner has been under any disability, or that he has acted in ignorance of, or been misled with respect to, his rights in the premises, nor that he has remained in repose, or been inactive, by reason of any promises, statements or representations made by the administrator.

We are not aware that this precise question has been passed upon, and the decisions give but little light upon the subject as to what acts on the part of the administrator may be relied upon to prevent the operation of the statute.

The provisions of the Code of Civil Procedure to which we have referred furnish the rules upon this subject for our guidance, and point out the only acts upon which we may rely to prevent the running of the statute or take a case out of its operation.

We must concede that there is much force in the argument advanced, that an executor or administrator should not be permitted to come into court, in his representative capacity, and enforce an obligation or liability, and immediately thereafter be permitted to successfully interpose the statute of limitations as a bar to a proceeding against him to account and make distribution.

The provisions of the Code do not recognize these acts as sufficient to take the case out of the statute, and, as the rule in equity applicable to trustees does not seem to apply to this proceeding, we are constrained to hold as already indicated.

The remedy of the petitioner may yet be open by an action at law under section 1819 of the Code of Civil Procedure, but it is barred in this proceeding, as we believe, and accordingly hold.

An order will be entered dismissing the proceeding.

Proceeding dismissed.

(Note as to limitation on right to compel accounting:)

The right of creditors or next of kin to compel an executor or administrator to account is barred by the six year statute of limitations. (Matter of Bradley, 25 Misc. Rep. 261; Matter

of Barnes, 25 id. 279; Matter of Boylan, 25 id. 281.)

Or, if not, by the ten year statute. (Matter of Longbotham, 38 App. Div. 607; Matter of Schlesinger, 36 id. 77.)

The statute does not begin to run in favor of an executor or administrator until he repudiates his liability as trustee. (Matter of Taylor, 30 App. Div. 213; Matter of Meyer, 98 id. 7.)

The plea of the statute should be raised by answer, and not by motion to dismiss the citation. (Matter of Jordan, 50 App. Div. 244.)

The defense of the statute may be set up at any time before the close of the evidence. (Matter of Rothschild, 42 Misc. Rep. 161.)

The filing of a voluntary account after six years is a waiver of the statute. (Matter of Lyth, 32 Misc. Rep. 608.)

The running of the statute against the legatee's right to an accounting may be intercepted by a partial payment. (Matter of Campbell, 21 Misc. Rep. 133.)

Payments of interest will not extend the time, where the creditor was not under disability or in ignorance of his rights, and did not remain inactive by reason of such payments or of promises or representations. (Matter of Bradley, 25 Misc. Rep. 261.)

In the Matter of the Judicial Settlement of the Estate of
SAMUEL OOSTERHOUDT, Deceased.

(*Surrogate's Court, Cattaraugus County, Filed January, 1896.*)

1. EXECUTORS—LIABILITY.

Where executors transfer to legatees personal property specifically bequeathed to them and make no provision for the payment of the debts, they are guilty of a *devastavit* and personally liable therefor.

2. SAME.

Where executors have transferred personal property to the legatees to whom it was specifically bequeathed, and allowed the devisees to take possession of the real estate, without taking any measures to provide for payment of the debts, they cannot be allowed for discounts paid by them to raise money to pay such debts.

3. BILLS AND NOTES—LIMITATION.

The right of action against an indorser is governed by the law of the State in which the indorsement was made, although the note is payable in another State.

4. EXECUTORS—PAYMENTS—OUTLAWED CLAIMS.

An executor has no authority to allow a claim against which the statute of limitations has run.

5. SAME.

On an intermediate accounting, to which the creditors are not parties, the executor cannot be credited with payment of an outlawed claim, although the heirs consented thereto.

6. ESTOPPEL—SILENCE.

Mere silence will not estop except in cases where there is not only a right, but a duty to speak.

Proceeding for settlement of the accounts of the surviving executors.

James H. Waring, for executors; O. S. Vreeland, for contestant.

DAVIE, S.—Samuel Oosterhoudt died at the town of Olean November 12, 1884, leaving him surviving his widow, Mary H. Oosterhoudt, a son, Samuel F., and two daughters, Eva E. Smith and Mary A. Allen. His will, bearing date November 3, 1884, was admitted to probate on the 26th of the same month. The widow and son and John B. Smith, the husband of one of the daughters, were named executors, and each duly qualified. The widow died June 10, 1890, without having participated to any great extent in the management of the estate.

The testator devised certain real estate to his widow absolutely, and bequeathed to her the income of his bank stock during life. He devised to each of his children and to a granddaughter certain real estate, and bequeathed to the son and to each of his two minor grandsons twenty shares of his bank stock after the death of the widow. The balance of his estate he devised and bequeathed to his three children, share and share alike.

Shortly after the probate of the will the legatees, by mutual agreement, took possession of the various parcels of real estate devised to them respectively. There were certain liabilities existing against the testator at the time of his death, some of which were absolute, and others, by way of indorsements, contingent.

In the account filed the executors charge themselves with total receipts to the amount of \$18,493.17. They credit themselves with having expended in the administration of said estate \$31,935.14. They report outstanding demands against the estate exceeding \$15,000.

The testator was the owner of sixty shares of the capital stock of the First National Bank of Olean, of the par value of \$100 per share, but actually worth much more. No certificates for such stock had been executed or delivered to the testator, but his name was entered on the books of the bank as the owner of and entitled to such shares. Dividends were declared by the bank upon such stock from time to time, usually semi-annually, and paid to the widow to the time of her death. On the 23d day of September, 1890, the officers of the bank, by direction of the surviving executors, executed certificates for such stock directly to the legatees, that is, for twenty shares to the son and to each of the two grandsons. On October 9th following, Samuel F. Oosterhoudt sold his stock to one Dusenbury for \$4,200, and on April 23, 1893, the twenty shares of stock issued to the grandson S. E. Smith were transferred by his general guardian to Dusenbury for \$4,160. The only reference made by the executors to this stock in their account is that it was specifically bequeathed, and had been turned over by them to the legatees. All the other assets were disposed of by the executors, as well as the land not specifically devised, the legatees all joining in the conveyance, and the proceeds arising from the disposition thereof expended by them in the course of administration. This being the situation of the estate, it is claimed on behalf of the contestant that this bank stock should have

been applied by the executors in the payment of debts, and that they were not authorized to transfer it to the legatees, although specifically bequeathed, leaving the debts unprovided for.

The rule is well settled that the personal property is the primary fund for the payment of debts. The order of marshaling assets for the payment of debts is: First, the general personal estate; second, estates specifically devised for the payment of debts; third, estates descended; and fourth, estates specifically devised, though charged generally with the payment of debts. 1 Birdseye's St. 1131.

The testator is presumed to act upon this legal rule in making a testamentary disposition of his estate until some distinct and unequivocal intention to the contrary is shown. *Hoes v. Van Hoesen*, 1 N. Y. 120; *Matter of Smith*, 19 St. Rep. 898.

There is nothing in the express provisions of the will exonerating the bank stock from the operations of this general rule; nor does the evidence relating to the extrinsic circumstances indicate any such intent on the part of the testator. An arbitrary construction of the terms of the will so as to exonerate the personal estate specifically bequeathed from all the burdens of debts and expenses of administration, thereby charging such debts and expenses upon the real estate specifically devised, would be entirely unsustained by authority. This is not a debatable question. It has been distinctly held that personal property, although specifically bequeathed, must be applied to the payment of debts before land specifically devised can be charged therewith; and, in consequence, where an executor first applied the rents of the real estate to the payment of debts, in such a case it was held to be a misappropriation of the funds, for which the executor was held liable personally. *Nagles v. McGinniss*, 49 How. 193; *Rogers v. Rogers*, 3 Wend. 503; *Matter of Smith*, *supra*; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379; 1 N. Y. 120; *Dodge v. Manning*, 11 Paige Ch. 334.

This question has frequently claimed the consideration of other courts, where it has been distinctly held that even a charge

of the testator's debts upon his lands generally, however formally framed, will not exonerate the personalty. *White v. White*, 2 Vern. 43; *Bridgman v. Dove*, 3 Atk. 20; *Hancox v. Abbey*, 11 Ves. 186; *Ancaster v. Mayer*, 1 Brown's Ch. 454.

The executors having made an unauthorized and improper application of this portion of the assets, they are personally liable therefor as for a devastavit. Conduct on the part of representatives amounting to devastavit is defined to be "such a mismanagement of the estate and effects of deceased in squandering and misapplying the assets contrary to the duty imposed on them for which executors and administrators shall answer out of their own pockets so far as they have had or might have had assets of deceased." *Williams' Ex'rs* (Eng. Ed.), 1796; 7 Am. & Eng. Enc. Law, 346, note 1.

Paying debts or legacies out of order, making mispayments, paying legacies before debts, applying the assets in undue funeral expenses, delivering property to next-of-kin, leaving debts unpaid, are all adjudged instances of such mal-administration as constitute devastavit. 7 Am. & Eng. Enc. Law, 346, note 2; *Cobb v. Muzzey*, 13 Gray, 58; *Place v. Oldham*, 10 B. Mon. 400; *McNair v. Ragland*, 1 Dev. 516.

The responsibility for this misappropriation rests upon both of the accounting executors. Each participated in the transaction for the disposition of the bank stock. One of the executors and a minor son of each were the beneficiaries of the transaction. Moreover, the executors each join in the account, and that is an admission of joint action and joint liability. *Matter of Glacius v. Fogel*, 88 N. Y. 434-443.

Oosterhoudt received \$4,200 for his stock; Smith, as guardian, \$4,160; and the stock transferred to Oosterhoudt's son was worth \$4,200,—making a total amount of \$12,560 with which the executors must be personally charged.

It is also claimed on the part of the contestant that the executors should be charged with interest upon the value of the bank stock from the time of its misapplication.

The liability of executors and administrators for interest must depend largely upon the particular facts of each individual case. There are, however, certain well-defined principles applicable thereto. In *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508, it is said: "Executors and other trustees are chargeable with interest if they have made use of the money themselves, or have been negligent either in not paying over the money or in not loaning or investing it so as to render it productive." This rule has been frequently recognized and applied. *Cowing v. Howard*, 46 Barb. 580; *Duffy v. Duncan*, 32 id. 593. They are liable for interest on moneys of the trust fund converted to their own use. *Schieffelin v. Stewart*, 1 Johns. Ch. 624; *Brown v. Rickets*, 4 id. 303; *Manning v. Manning*, 1 id. 535; *Mumford v. Murray*, 6 id. 1; *Kellett v. Rathbun*, 4 Paige, 102; *De Peyster v. Clarkson*, 2 Wend. 78.

The law exacts fidelity of a trustee in the management of his trust. If he is guilty of fraud or mismanagement, or is guilty of a breach of trust, or has used the trust funds for his own purpose, he may be compelled to pay interest. *Price v. Holman*, 135 N. Y. 133.

Executors have been charged with interest where, by their wrongful acts, as by mispayments, they have disappointed claimants (*Jones v. Ward*, 10 Yerg. 161); where, without reason, they have recalled funds out at interest (*Verner's Estate*, 6 Watts, 250); where they unreasonably refuse or neglect to account. *Gray v. Thompson*, 1 Johns. Ch. 82.

An application of the principles enunciated in the authorities cited to the case at bar, considering the transaction of the disposition of the bank stock independent of any other features of the case, would render the executors liable for interest to some extent upon the value of the stock; but the conclusions reached, as hereinafter set forth, regarding the executors' credits in their account for discounts paid by them indirectly reaches the same result. The executors ought not to be charged with interest, and their claim for reimbursement for discounts paid

by them also disallowed. This would be subjecting them to a double penalty.

The accounting executors from time to time made their promissory notes as executors, and caused them to be discounted at the First National Bank of Olean. One of such notes, dated February 8, 1893, was for \$3,265; another, dated March 19, 1893, for \$1,077.63; another, dated March 9th of the same year, for \$750; another, dated April 29th of the same year, for \$250; and each due in three months from date. Such notes have been renewed from time to time, and are still outstanding, and held by the bank. The total amount paid by the executors as discount to this bank was the sum of \$2,246.69.

On the 11th day of June, 1888, the executors made their promissory note as executors for the sum of \$3,000, and procured the same to be discounted at the bank of Henry Hamlin; and again, on the 14th day of May, 1889, they made another note for \$3,000, which they also discounted at the same bank. The executors renewed these notes from time to time, paying various sums upon the principal, until the first note was reduced to \$1,400, and the second to \$1,700. The total amount paid by the executors to Hamlin as discount upon these two notes and their various renewals was the sum of \$1,082.58. The executors in their account credit themselves and charge the estate with the discount so paid, amounting in all to the sum of \$3,329.27. The contestant objects to the allowance of this item.

No question is raised but what the executors used the proceeds of these various notes in payment of pressing demands against the estate, yet the conclusion already reached in regard to the application of the bank stock made by the executors necessarily has some bearing upon this question. It is evident that, if this stock had been properly applied by the executors in extinguishment of the liabilities of the estate, the necessity for raising funds from which to pay debts through the instrumentality of repeated discounts would not have existed. The power of executors and administrators to borrow money for the

benefit of their estate is restricted, and ordinarily not justifiable. The line of conduct of such representatives is clearly defined by law. They are required to proceed with reasonable diligence in applying the personal estate in the extinguishment of debts. In case of insufficiency of the personal estate the real estate should be resorted to in the manner prescribed by statute relating to the disposition of decedents' real estate for the payment of the debts. This the executors have not done. They have not only delivered the personal estate to the legatees, regardless of debts, but have also permitted the devisees to take possession of the real estate, without taking any measures to meet the debts of the estate. This was, in effect, turning over to the legatees more than they were entitled to receive, and then borrowing money and paying heavy discounts to meet, or rather defer, the payment of valid claims. It has been held that executors are not entitled to be credited with interest paid to raise money for advances to beneficiaries in excess of their distributive share. *Adair v. Brimmer*, 74 N. Y. 538-557.

The executors are not entitled to be credited with any part of this discount.

The testator, at the time of his death, and for some years prior thereto, had been a member of the firm of Oosterhoudt & Grimes, and as such engaged to some extent in dealing in lumber. This firm became the owner of three promissory notes made by Hall, Anderson & Co., of East Liverpool, Ohio, dated April 23, 1875. The first was for \$776, due in ninety days; the second, for \$803.60, due in six months; and the third, for \$1,219.26, due in nine months from date,—all payable to the order of Oosterhoudt & Grimes at a bank in East Liverpool. Before the maturity of either note the firm of Oosterhoudt & Grimes indorsed each of them and procured them to be discounted at the First National Bank of Olean. These notes, when due, were presented at the bank in East Liverpool for payment, and payment denied, and each note protested, and the firm of Oosterhoudt & Grimes duly charged as indorsers thereon.

After their dishonor these notes were delivered by the cashier of the First National Bank of Olean to its attorney, and by him forwarded to one Hall, an attorney at East Liverpool, for collection. The first note was so delivered August 31, 1875; the second, October 30, 1875; and the third, February 25, 1876. Two payments were made on the first note, viz.: \$450, December 8, 1875, and \$249.30, January 3, 1876. Nothing else was paid on either of them, and the First National Bank of Olean continued to hold the notes down to the death of the testator. After his death, and on the 29th day of June, 1885, one Lawton, who was the cashier of this bank, took up these notes, and became the owner of them, paying the bank the amount remaining unpaid thereon, to wit, the sum of \$2,863; and thereafter the executors made their own note as executors, and delivered the same to Lawton in place of the original Hall, Anderson & Co.'s notes. Lawton held such new note for a time, but subsequently transferred it to the Cuba National Bank. The executors paid to Lawton, for interest on such note accruing while he held it, the sum of \$331.95. They subsequently paid the note to the Cuba National Bank, paying thereon, June 16, 1887, \$2,270.20, and on September 15th of the same year the balance, \$883.40.

The other partner, Grimes, having died intestate, an administrator of his estate was appointed, who transferred to one J. H. Grimes such interest as belonged to his estate in said copartnership affairs, and J. H. Grimes began an action in Supreme Court against the executors of the Oosterhoudt will for an accounting, claiming a large balance. The executors appeared and answered, alleging, among other things, the payment of the Hall, Anderson & Co.'s notes. The case was tried before a referee, who reported thereon, finding the facts substantially as herein set forth, and, as matter of law, that the payment by the executors of said notes was unauthorized and illegal, inasmuch as the right of action existing thereon against the indorsers, Oosterhoudt & Grimes, was barred by the statute, and

judgment was entered thereon, and affirmed on appeal to the General Term. *Grimes v. Oosterhoudt*, 18 St. Rep. 422.

The executors credit themselves in the account filed with the amount paid by them in extinguishment of the Hall, Anderson & Co.'s notes, to which payment the contestant objects.

It is entirely evident that the right of action against the testator upon his indorsement of each of these notes was fully barred by the statute prior to his decease. The evidence shows that Oosterhoudt conferred, from time to time, with the attorney of the bank in regard to the collection of these notes; but it does not show, directly or inferentially, any arrangement or agreement suspending the running of the statute as against the cause of action upon his indorsement. Over eight years elapsed after the testator became charged as indorser, and before his death. During all that time the testator was a resident of the same town in which the bank was located. No legal impediment existed to the bringing of an action in favor of the bank against him at any time during the six years next immediately following the protest of the notes.

The original notes having been made and delivered in Ohio, and made payable there, the laws of that State would, of course, regulate the liability of the makers; but the discounting of the notes at the First National Bank of Olean, and the indorsement made for that purpose, were transactions consummated entirely with reference to and governed by the laws of this State. The indorser of a bill or note is regarded as undertaking to pay at the place where his indorsement is made, and he is bound by the laws of the place of indorsement even though the note be expressly payable elsewhere. 2 Daniel Neg. Inst., sec. 399.

Upon indorsement a new contract arises governed by the laws of the place where it is made. 2 Am. & Eng. Enc. Law, 384; Edmunds Bills & N. 262.

In determining the *lex loci contractus* the engagements of the maker and indorser of a note are to be treated as independent contracts. *Lee v. Selleck*, 33 N. Y. 615; *Van Staphorst*

v. Pearce, 4 Mass. 258; Kilgore v. Bulkley, 14 Conn. 362; Cook v. Litchfield, 9 N. Y. 279.

Where a party residing in this State holds a note payable in another State, indorses it, and procures it to be discounted here, his contract is that, upon such note being presented where it is payable, and there dishonored, he will pay it here. *Artisans' Bank v. Park Bank*, 41 Barb. 599.

The First National Bank of Olean could have maintained an action against the testator upon his indorsement immediately after the protest of these notes. The right of action accrued at that time, and was barred by the statute at the end of six years.

This demand being barred, it was the duty of the executors to resist payment. An executor is bound to set up the bar of the statute, and he has no authority to allow a claim so barred as against an estate. A debt so barred, so far as the liabilities of an executor is concerned, is to be regarded as no debt. *Butler v. Johnson*, 111 N. Y. 204.

An executor cannot be allowed upon his accounting any sum paid by him on such a demand. *Bloodgood v. Bruen*, 8 N. Y. 362; *Bucklin v. Chapin*, 1 Lans. 443; *Burnett v. Noble*, 5 Redf. 69.

But it is contended on behalf of the accounting executors that this demand was adjusted and paid by consent of all the heirs, including the contestant. Mrs. Smith did undoubtedly acquiesce in such payment, but the evidence is somewhat conflicting in so far as it relates to the contestant's participation in such arrangement. Mrs. Smith, the wife of the executor, testified as follows: "Q. After a time, was there any talk in the family about a claim that Lawton had against the estate? A. Yes, sir. Q. More than once? A. Yes, sir. Q. Where did it take place? A. Always at my father's house in the city. Q. How many different conversations can you remember that took place when Mrs. Allen was present? A. I can't remember. I heard it talked so much that we were all tired of it. Q. You may relate the different conversations had in respect to this matter? A. I

can't tell; only that my mother always said that it was to be paid; that my father's honor was to be preserved under any circumstances. Q. Was this matter talked over there in the family before the arrangement was made with Mr. Lawton for the payment? A. Yes, sir." On her cross-examination this witness testified as follows: "Q. I don't understand you to claim that Mrs. Allen ever consented that this Lawton debt should be paid, did you? A. I have never heard the slightest objection. Q. You don't claim that you ever heard Mrs. Allen consent that this Lawton debt be paid? A. Only by silence giving consent."

The executor Smith testified that on one occasion the subject of the payment of this debt was discussed between himself and wife and Mrs. Allen, the executor Oosterhoudt and the widow, and that he (Smith) informed them that he had seen Lawton and looked the matter over, and become convinced that the testator had had the money, and that the widow said if they were convinced that testator had had the money, she wanted it paid; and, quoting from his testimony, "My wife said, I think, that she wanted it paid, and Mr. Oosterhoudt (the executor) wanted it paid, and I think Mrs. Allen expressed herself in so many words; but I am not able to say. Q. What, if anything, did Mrs. Allen say? A. Mrs. Allen said the only objection she had to paying it was that old Lawton would get it; that she had always despised the man. That is all, in substance. Q. Was there anything more said? A. We said we were going to pay it. Q. Did Mrs. Allen say anything else? A. No, sir. Q. Was it after you had stated that you were going to pay it that Mrs. Allen made the remark you have stated she did make? A. Yes, sir."

The evidence of the other executor throws no light on this subject. The contestant gave her version of the transaction as follows: "Mr. Smith said that Lawton had been down to the mill again, hounding Frank about that debt. I said I did not think the claim ought to be paid. I gave my reasons. I said

that my father said that he was not to pay it, and that his children should never pay it. I remember that my mother said she did not see why Lawton expected the estate to pay it. Pa had said that he ought not to pay it. At that time Smith said that he didn't think we ought to pay it. I know that I said on that occasion, that I objected to it on the ground, just as I did at first, that my father said he shouldn't pay it, and that none of his children should pay it; that it was not his to pay. Q. Did Mr. Smith ever say, in your presence, that he intended to pay it? A. No, sir. Q. When did you first learn that the claim had been paid? A. The fall of 1889."

This was substantially all the evidence bearing upon this proposition. The most that the executors can claim from the evidence presented on their behalf, if entirely uncontradicted, was that when the subject of paying this claim was discussed in the family the contestant expressed no dissent; that she remained silent. So the question presented is simply this: the executors proposed, in the presence of the contestant, to pay an outlawed claim. The contestant makes no response. Does silence, under such circumstances, establish consent or acquiescence, constituting estoppel?

It is stated as a rudimentary principle, that: "When a man has made a declaration or representation, or caused, or in some cases not prevented, a false impression, or done some significant act, with intent that others should rely and act thereon, and upon which others have honestly relied and acted, he should not be permitted to prove that the representation was false, or the act unauthorized or ineffectual, if injury would occur to the innocent party who had acted in full faith in its truth or validity." 2 Pars. Cont. 793, c. 4, sec. 4.

If the contestant had made any positive declaration of assent, which had been acted upon by the executors, she would not now be permitted to question their authority. She would be estopped under the principle above enunciated. But mere silence on her part cannot have that effect. To constitute an estoppel, there

must have been some act or admission by the contestant inconsistent with the claim she now makes, done with the intention of influencing the conduct of the executors, and which she had reason to believe would, in fact, have that effect. Silence will not estop, except in those cases where there is not only a right, but a duty to speak. *N. Y. Rubber Co. v. Rothery*, 107 N. Y. 310; *Viele v. Judson*, 82 N. Y. 32; *Diffenbach v. Vogler*, 61 Md. 370.

The only reasonable construction to be given to the entire evidence bearing on this question is that the contestant expressed a decided and positive objection to the payment of this claim when the matter was discussed in her presence, and that, so far as she was concerned, the executors were unauthorized to make the payment.

But there is another feature of this case absolutely precluding the right to allow this credit to the executors upon this accounting. The account filed, as already stated, concedes that there is a large amount of unpaid indebtedness existing against the estate. This accounting is an intermediate one. The creditors are not parties to this proceeding, not having been cited. They are interested in the determination of this question, which must be disposed of in the same manner as if the creditors were present and objecting to the allowance of this claim. Whatever arrangement may have been made between the executors and the heirs with reference to the payment of the Lawton claim, the creditors are not bound thereby, there being no pretense that any of the creditors assented thereto.

After the death of the testator and the probate of the will, the dividends declared upon the bank stock owned by the testator were paid to the widow to the time of her death. Seven dividends of \$300 each were so declared and paid to her. It is claimed on the part of the contestant that the executors should account for and be charged with such dividends.

The representative of the estate of the widow was not cited upon this accounting; consequently, the determination of this

question should be postponed until the final judicial settlement of the accounts of the executors.

The propositions to which I have referred are the principal ones involved in this litigation. There are numerous other subjects of controversy to which I have not alluded in this decision, but I have endeavored to make my findings of fact sufficiently explicit in regard to each, that there may be no misapprehension as to the conclusions to which I have arrived.

A decree will be entered in conformity to my findings of fact and conclusions of law herewith submitted.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Accounts of
FRANK CURTISS et al., as Executors and Trustees of
ABIJAH CURTISS, Deceased.

(Surrogate's Court, Westchester County, Filed January, 1896.)

1. EXECUTORS—COMMISSIONS.

Where the residuary estate is given to the executors in trust to pay the income to the widow and children during their lives, and the principal to their heirs at their respective deaths, their duties as executors and trustees are separate and distinct and they are entitled to double commissions.

2. SAME.

Where the estate is given directly to the executors and trustees, and it is not necessary to convert the securities into cash for the payment of debts, they may retain such securities in their original form and are entitled to commissions thereon.

3. SAME—REAL ESTATE.

In such case they are not entitled to commissions on the proceeds of the sale of real estate where such sales were not necessary for the payment of debts and legacies.

4. ADMINISTRATORS—APPOINTMENT.

Where, at the time executors and trustees are permitted to resign, the residuary estate has been ascertained for the purposes of the trust, an administrator with the will annexed should not be appointed.

5. EXECUTORS—RESIGNATION.

An executor cannot resign, and can only be relieved by an application for the revocation of his letters.

Application to settle decree on resignation of trustees.

Vanderpoel, Cuming & Goodwin (Henry Thomson, of counsel), for executors; Potter & Johnson, for Caroline C. Johnson; William P. Fiero and J. Q. A. Johnson, special guardians.

SILKMAN, S.—The court, upon the application of the petitioners, permitted their resignation, but upon condition that trustees' commissions upon the principal of the trust estate be waived. The authority for imposing such a condition is found in the case of *Matter of Allen*, 96 N. Y. 327.

The court intended that the petitioners should have commissions of executors, but none as trustees, upon the principal of the trust. It was directed that the decree to be entered should be upon notice, and now the settlement of the decree to be entered is before the court for consideration.

It is urged by the special guardians, with much insistence:

First, that the petitioners would not be entitled, in any event, to commissions in the two capacities,—as executors and as trustees—because, it is claimed, the functions and duties of executor and trustee co-exist and run together, that the will does not provide for separate and successive duties.

Second, that the decree entered on the 17th day of June, 1891, is not conclusive as to the allowance of commissions, because the life beneficiaries only were made parties to the proceeding, the infant *cestui que trust* not having been cited; and,

Third, that the duties to be performed under the will are not duties which can be performed by a substituted trustee, but must be performed by an administrator with the will annexed.

The testator, by the seventh clause of his will, provided as follows: "All the rest, residue and remainder of my estate,

both real and personal of whatsoever nature, and wheresoever situated, I give, devise and bequeath unto my executors herein-after named, their survivors, successors and assigns, in trust, however, to take the same in their possession; to convert the same into money, without needless sacrifice, subject to the exceptions above set forth; to invest the same in such securities as they may from time to time see fit, whether they are the securities recognized by law for investment by executors and trustees or not; to continue, in their discretion, any investment which I have made; and to dispose of the same as follows, viz.: The said residuary estate shall be divided into two equal parts, to be separately invested, to be known as 'Fund No. One and Two.'

"Fund No. one shall, for purposes both of division of income and principal, be divided into shares, one share for each of my surviving children, and one share for each child of mine that shall have died before me, leaving issue; and, for the purposes of such subdivision and apportionment, the amount of my balance appearing on my books at my death against any child of mine, or any sum which shall be owing to me, except as above released, shall be considered, not as a debt, but as an advancement, and shall be counted as cash in making up the apportionment aforesaid, and the share of each child shall be less by such amount than it otherwise would be.

"I direct my executors to pay over or apply the net income of each child's share, ascertained as above stated, to his or her use during the term of his or her natural life, except that no more than fifteen hundred dollars a year shall be paid or applied to the use of my son Frederick during his minority. I also authorize and empower them, or the survivor of them, their successors in the trusts, in their discretion, to make to each child advancements out of the principal of each one's shares so held in trust for them respectively, as may be deemed for their highest good, in the following sums."

Testator then names the times at which the part of the prin-

cipal may be advanced to his children, respectively. He then provides:

"The net income of the respective sums so held in trust for my children shall be paid to them, or applied to their use, during the term of their natural lives, for their maintenance and support; the principal, or so much thereof as shall remain at their respective deaths, to be paid or transferred to their heirs or next-of-kin."

The testator then provides as to fund No. two as follows:

"The income of fund No. two shall be paid over, as the same accrues, to my wife, Mary E. Curtiss, during her life, for her own use absolutely. After her death, or in case she reject this provision, and claim dower instead, the income and principal, both of said fund No. two and of the other property mentioned in this will, not specifically devised or bequeathed, shall be disposed of in the same manner as fund No. one; but the amount of advancement to my children, respectively, shall not be increased thereby."

The testator then, by the eighth clause of his will, provides:

"The legal title to all my real estate subject to the provisions of this will shall vest in my executors and trustees, and they are hereby authorized and empowered to sell and convey, lease, and, in general, deal with the same in their discretion."

He then provides that the property which his wife is given the use of for a period of years shall not be sold without her consent, and that property specifically devised to his son Frederick shall not be sold unless he refuse to accept the same upon the terms provided, and further provides that the distributive shares of any of the distributees might be valued and set off in lieu of sale and distribution of the proceeds.

Testator then, by the ninth clause, nominates and appoints "my brother, Frank Curtiss, and my friend Frederick DeBil-lier, executors of this my last will and testament."

It is claimed that the duties under the provisions above quoted are so mingled with the duties of executorship that there

is an intention evident on the part of the testator not to separate the offices of executor and trustee, and that the legal conclusion from such provisions is that the duties and functions run together and are inseparable, and that the executors and trustees named are entitled to commissions in the capacity of executors only.

In this claim I think the special guardians are in error. While it is true that the testator uses the term "executors" when, perhaps, it would have been more appropriate to have used the term "trustees," the use of the term "executor" or "trustees" does not necessarily define the character of the office. Whether they are to act in the capacity of executors, or that of trustees, is to be determined by the functions which they are to perform. The duties of an executor are usually simple,—the burial of the deceased, the collection of his assets, the payment of his debts and legacies, and the distribution of the residue to those entitled thereto, as residuary legatees, heirs-at-law or next-of-kin. The distribution of the residue may be immediate, or it may be postponed, and be paid in installments or by way of annuity, or paid to trustees for the use and benefit of beneficiaries named. The retention by executors of any portion of the estate upon a trust provided for is a distribution of that part,—as much so as if the same had been paid to other persons as trustees. If paid to a trustee, or retained by the executor as trustee, the distribution, to be valid, must be under one of the trusts authorized by the Revised Statutes. Bearing in mind the simple duties of an executor, and the fact that the duties of a trustee must be those in the execution of a trust authorized by statute, we will have no difficulty in determining where the executorial duties leave off, and the trustee's duties begin.

In this case the testator has given his residuary estate to his executors, in trust, to pay to, or apply to the use of, his wife and children the income thereof during their natural lives. This is a trust duty, pure and simple, and depends upon the Revised Statutes for its validity. While it may be true that for a cer-

tain period the duties of the executors and of the trustees co-exist and run together, by reason of the fact that, the trust being for the support and maintenance of the testator's wife and children, they are therefore entitled to the income from testator's death, the running together of such duties lasted only until the ordinary executorial duties had been fulfilled, and the amount of the residue of the estate established. The Code provides for the compensation of executors (section 2730), and also for the compensation of testamentary trustees, separate from that of executors. Code, section 2802.

It is clear from the authorities that, where it is contemplated that the executors' duties are to end and the trustees' duties are to begin, double commissions may be allowed,—one commission to the executors, and another commission to the trustees. *Laytin v. Davidson*, 95 N. Y. 263.

In fact, under the provisions of the Code as they exist, there is no power to deny such commissions, except for misconduct on the part of the executor or trustee.

The facts in the case of *Laytin v. Davidson*, where double commissions were allowed, are similar to those in the case before us. It was said in that case that the duty of distribution into shares, and to receive and apply the income of the several shares to the use of the beneficiaries, respectively, could not be performed until the residue given to the executors in trust to divide into shares, and pay over and apply the income of the several shares to the testator's wife and children, had been ascertained.

In the case before us, the residue was ascertained by the decree of the surrogate upon the accounting of the executors in 1891.

I have carefully examined the case of *McAlpine v. Potter*, 126 N. Y. 285, relied upon by the special guardians, but do not think the facts in that case admit of its being cited or of its being an authority in this. There the testator gave to his trustees all his real and personal estate, in trust, for the pur-

poses named, and to retain his estate entire and undivided, except as provided for, and then provides for the payment by his trustees of his funeral expenses, debts, taxes, etc. There were no duties to be performed by the executors as such, and there was no residuary estate to be ascertained. The duties were to be performed by the trustees from the beginning. Judge FINCH says: "At its very outset it makes the executors wholly and continuously such, or wholly and continuously trustees; for in its first sentences it gives the entire estate in trust, and directs the executors and trustees hereinafter named to retain it undivided till the period of distribution, and meanwhile to pay funeral expenses, debts accruing, taxes, repairs, reasonable insurance, one fixed and definite annuity, and aliquot parts of the net accruing income until the final distribution."

It is a proper criticism of the will under consideration in *McAlpine v. Potter*, to say that it appointed trustees only, and that there were no duties to be performed by executors.

Here the duties of executors and trustees are separate and distinct, and in such a case the law not only permits, but directs, the allowance of double commissions.

We are then brought to the point that the allowance of commissions by the Surrogate in the decree of June, 1891, is not conclusive upon the infants represented by the special guardians, because such infants *cestuis que trustent* were not made parties thereto. The mere statement of the position of the special guardians carries with it the answer that, as to such parties, the court must now review the allowance of commissions upon principal. All the parties interested in the income were made parties to the proceeding, and are consequently bound by the decree.

It is urged that the executors were not entitled to commissions allowed upon securities possessed by the testator at the time of his death, and retained by the executors and trustees, but which might have been converted into cash in order to determine the cash value of the residuary estate.

I disagree with the position of the special guardians as to the

right of the executors to commissions upon the value of these securities received by them and retained by them as trustees under the trusts contained in the will.

The trustees were legatees and devisees of the entire residuary estate, and as such had a right to elect to take it in the form in which it was left by the testator, provided it was unnecessary to convert it for the purposes of paying debts and legacies; and such election does not deprive executors of commissions thereon, nor does the fact that the same persons are executors and trustees impair such right to commissions. *Matter of Moffat*, 24 Hun, 325; *Matter of Mason*, 98 N. Y. 536; *Phoenix v. Livingston*, 101 id. 451; *In re Willets*, 112 id. 289.

It would be impolitic for the law to deny to executors commissions under such circumstances, because to do so might invite the disposal of investments judiciously made by the testator, for the purpose only of entitling such executors to commissions upon the proceeds. It is the policy of the law to remove this temptation.

It must, therefore, be held that the executors have the right to have the securities considered as cash, for the purpose of computing their commissions. There has been no judicial determination, however, as to the value of these securities, in a proceeding in which all the parties interested could have been heard as to such value. Their value, therefore, can only be considered as it has been fixed by the appraisers upon the inventory and appraisal made under the order of the surrogate.

I do not understand that the case of *McAlpine v. Potter* holds contrary to the views expressed. As has been stated, the will in that case provided for the functions of trustees only, and directed the estate to be held entire and undivided until disposed of as provided.

The court held that the period of distribution had not arrived, and, until that time arrived, no commissions could be allowed upon the securities which came into the hands of the trustees.

The language of Judge FINCH clearly distinguishes the case

from the present one. He says: "The bulk of the estate came to the executors in the form of securities which have not been turned into money. No law justifies the allowance of half commissions upon their estimated value in advance of their conversion into money or its equivalent. * * * A time may come when the allowance may be entirely just and proper. That will be when the securities have been turned into money for the purpose of payment, or have been accepted by the legatees as cash without being converted."

In the case before us the trustees, as residuary legatees, accepted the securities; and it must be assumed that they were of the value determined by the official appraisers, and were taken at that value.

I am, however, of the opinion that the executors are not entitled, as such executors, under the provisions of testator's will, to any commissions upon the real estate sold. The title to this real estate passed to the trustees under the devise of the rest and residue of testator's property. There was no necessity for, nor purpose to be served by, a sale of the realty by the executors. The executors had no right to deal with it, unless it should become necessary for them to convert it for the purpose of paying debts and the legacies provided for in the will. While it is true that the testator provides, in the eighth clause, that "the legal title to all my estate, subject to the provisions of this my will, shall vest in my executors and trustees," the language used must not be construed in its literal sense, but according to testator's evident intention to give the title to his executors, as trustees, for the purposes of the trust. The eighth clause must be read in connection with the seventh, in which he gives all the rest, residue and remainder, both real and personal, to his executors, their survivor and successors in trust, to take the same into possession, and to convert the same into money. The sale of the real estate was a duty to be performed by the trustees, and not by the executors, and commissions can be allowed only upon the proceeds of the real estate to the executors as trustees; and, as

I have decided that the trustees shall be allowed to resign only upon waiving their commissions as trustees upon the principal, whatever executor's commissions may have been allowed in the former decree upon such proceeds of the real estate sold must be disallowed.

As to the point taken that there should be an administrator with the will annexed appointed, I cannot agree with the special guardians.

The duties of the executors have been performed, and the residuary estate ascertained for the purpose of the trust, although it may not all have been sold and converted into cash, and reinvested. There remain only trust duties to be performed.

I have examined the case of *Greenland v. Waddell*, 116 N. Y. 284, relied upon by the special guardians. The facts in that case were very different from those under consideration. In that case the will under consideration contained a power in trust given to the executors to sell and dispose of the testator's real and personal property, and to distribute the proceeds, one-third of which only they were to hold under a valid trust—a clear case of power in trust only, except as to the one-third, as to which they had the legal title. Powers in trust are to be exercised by executors, and not by trustees.

Mr. Curtiss, however, gave his entire residuary estate to his executors, as trustees under a valid trust; and they were possessed not only with a power of sale, but the legal title as well.

I think the cases are clearly distinguishable.

This proceeding, as appears by the petition, is an application on the part of the testamentary trustees for leave to resign, under the authority of section 2814 of the Code. The petitioners cannot resign as executors. From such duties they can only be relieved by an application to have their letters testamentary revoked under the authority contained in section 2689 of the Code.

My conclusions are, therefore, upon the objections by the special guardians to the decree proposed by the petitioners:

(1) That the duties of executors and of trustees under the will of testator are clearly separate and distinct, and the petitioners were entitled to full commissions as executors when the residuary estate was ascertained, and would have been entitled to another full commission as trustees, had they continued to fulfill their duties as such.

(2) That the petitioners were entitled to commissions as executors upon the securities which came into their hands from the testator, and were retained by them and held by them, as trustees, as investments.

(3) That no commissions should have been allowed upon the proceeds of the real estate sold.

The commissions to which the executors were entitled upon their previous accounting must be based upon the following statement of account: The executors are chargeable with the amount of the inventory, \$282,323.85, less the assets uncollected and undisposed of, \$5,670.75, leaving a balance of \$276,653.10, upon which balance each executor was entitled to a commission of \$2,941.53.

The amount of commissions upon income allowed upon the former accounting does not appear to be separated from the gross amount of commissions allowed. If the amounts had been separately stated, that decree would have been conclusive as to income, because all the beneficiaries interested in the income were parties to the proceeding.

It is therefore necessary to determine now what commissions the executors were entitled to upon such income, either as such executors or trustees. The income of the personal property seems to have been \$29,228.16, and the income of the real estate \$11,564.91. The account covered the period from October 24, 1888, to April 30, 1891. I find commissions on such income to be the sum of \$582.93, to be divided between the executors. The total of amount of commissions, therefore, to which the executors were together entitled on the former accounting, as executors and trustees, is the sum of \$6,465.99, of which

\$5,883.06 is chargeable to principal and \$582.93 to income. Upon the present account I compute the commissions to which the trustees are entitled upon income to be \$1,453.72. As the estate seems to have been managed almost entirely by the trustee Curtiss, two-thirds of the latter sum is awarded to him.

No final decree, however, can be entered at the present time. An interlocutory order may be entered declaring that certain reasons exist for accepting the resignation of the petitioners as trustees, upon the condition imposed, directing the payment of all money and securities belonging to the trust, and the delivery of all books, papers, and other property of the trust, to the county treasurer, and directing that the petitioners bring into court an account of their proceedings under such order, as well as since the date of the account filed herein, to the end that a decree may be made finally settling their accounts, and forever discharging them and appointing a new trustee.

This would seem to be the correct practice under the Code of Civil Procedure (sections 2814, 2818).

The final decree may provide for the payment of the costs and expenses of this proceeding out of the moneys so to be deposited.

Ordered accordingly.

Note.—Where the income is to be received by the trustees directly, and not held by them as executors, they are not entitled to commissions on such income as executors. (Matter of Tucker, 29 Misc. Rep. 728.)

Where the residue of the estate is given to them as trustees, with a discretionary power of sale and remainder over on the death of the life beneficiary, they are not entitled to commissions on real estate which has not been sold. (Matter of Tucker, 29 Misc. Rep. 728.)

In the Matter of the Estate of **FREDERICK G. FLINT**, Deceased.

(*Surrogate's Court, Otsego County, Filed February, 1896.*)

EXECUTORS—ACCOUNTING.

An undertaker or other person holding a claim for funeral expenses is not a creditor or person interested in the estate within the meaning of section 2727 of the Code, and cannot maintain a proceeding to compel the executor to account.

Proceedings for a compulsory accounting.

S. W. Barnum, for petitioner; C. M. Bates, for administrator.

ARNOLD, S.—Frederick G. Flint died on the 1st day of June, 1894, intestate. His only heir at law and next of kin is his brother, Elisha Flint.

On the death of Frederick, Elisha engaged the petitioner here, who is an undertaker, to furnish a casket and render the necessary services in the burial of decedent. Soon after the funeral the undertaker duly presented his bill for \$192 to Elisha Flint for the casket so furnished and the services so rendered.

On the 4th day of October, 1894, Elisha Flint paid to the undertaker, on account of the bill so presented, the sum of \$50. The remainder of the bill is not disputed, but no further payment has been made.

On the 4th day of December, 1894, Elisha Flint was duly appointed administrator of the estate of decedent, duly qualified and entered upon the discharge of his duties as such administrator, and is still acting as such.

On the 6th day of January, 1896, the petitioner, William Drane, instituted these proceedings against the administrator for a compulsory accounting and for payment of his claim. On the return day of the citation the administrator appeared

and filed objection to the jurisdiction of the court to entertain the proceeding. No other proceeding has ever been taken to collect the claim, and no action has ever been brought for its collection. The administrator has sufficient assets to pay the same.

Every person has the right to a decent Christian burial. The common law casts upon some one the duty of seeing that the decedent is accorded that right. In the case at bar the duty was cast upon the brother, who is now acting as administrator of the decedent's estate. 2 Bl. Comm. 508; *Queen v. Stewart*, 12 Adol. & E. 773; *Rappelyea v. Russell*, 1 Daly, 214; *Ferrin v. Myrick*, 41 N. Y. 315.

The expenses incurred in this case were reasonable and proper. If the administrator had paid them, as was his duty, he would be allowed for the amount so paid on his final accounting. But he neglects to pay the same, and it becomes necessary to consider the rights and remedies which the holder of such a claim has to obtain payment.

It seems to have long been the rule of common law that necessary funeral expenses should be allowed prior to other debts and charges. 2 Bl. Comm. 508.

The common practice is for executors or administrators to pay these expenses before any others. An executor is authorized by statute to pay funeral expenses before letters testamentary are granted. 2 Rev. St. p. 71, sec. 16.

It is certainly the duty of an administrator or executor to pay the funeral expenses of the decedent from his estate. *Ferrin v. Myrick*, 41 N. Y. 315; *Patterson v. Patterson*, 50 N. Y. 582. The funeral expenses are a charge upon the estate. *Id.*

It seems that in many states an action may be maintained against an executor or administrator, as such, for the funeral expenses of the decedent, and that judgment may be rendered *de bonis decedentis*. *Hapgood v. Houghton*, 10 Pick. 154; *Samuel v. Thomas*, 51 Wis. 549; *Seip v. Drach*, 14 Pa. St. 352; *Campfield v. Ely*, 13 N. J. Law, 150. But this does not

seem to be the modern English doctrine (*Corner v. Shew*, 3 Mees. & W. 350), nor the law of this State.

In this State the leading case in point seems to be *Ferrin v. Myrick*, 41 N. Y. 315. In that action it appeared that grave-stones had been furnished to mark the graves of the administrator's intestate. Suitable gravestones are a part of the funeral expenses. 2 Williams' Ex'rs (9th Ed.), 171; *Matter of Howard*, 3 Misc. Rep. 170; *Owens v. Bloomer*, 14 Hun, 206. The administrator had sufficient assets of the estate in his hands to pay the same. Plaintiff, who furnished the tombstone, sued the administrator in his representative capacity, and the administrator filed a demurrer. The court, after carefully reviewing the authorities, say: "The following principles are settled by these authorities:

"(1) That for all causes of action arising upon a contract made by the testator in his lifetime, an action can be sustained against the executor as such, and the judgment would be *de bonis intestatoris*.

"(2) That in all causes of action where the same arises upon a contract made after the death of the testator, the claim is against the executor personally, not against the estate, and the judgment must be *de bonis propriis*.

"That these different causes of action cannot be united in the same complaint." 41 N. Y. 322.

The court further say, at page 325: "It is certainly the duty of the executor to pay the funeral expenses of the deceased from his estate, and it has been well held that suitable grave-stones are a part of such expenses. 2 Williams' Ex'rs, 871, and note; 2 Redf. Wills, 224.

"The expenses do and should fall upon the estate and not upon the executor. But it does not follow, as a logical sequence, that an action at law can be maintained against the estate to recover the amount. I have endeavored already to show why the action should not be sustained against the executor as such, and why it may be sustained against him personally. It ought

to be added that, in case of the fraud or insolvency of the executor, an equitable cause of action would probably be thereby created against the estate, which could be enforced in behalf of the creditor, and which would enable him to maintain a claim against the estate directly."

This case seems to have been cited with approval in many cases in the Court of Appeals and the lower courts. 47 N. Y. 366; 58 N. Y. 321; 59 N. Y. 586; 63 N. Y. 288; 74 N. Y. 46; 85 N. Y. 297; 92 N. Y. 82; 98 N. Y. 300, 516; 101 N. Y. 558; 130 N. Y. 520.

In the case at bar the contract was made with Elisha Flint individually, and under the above authorities the undertaker would be obliged to sue him as an individual. He could not maintain an action against him as administrator in the first instance. 7 Am. & Eng. Enc. Law, 340.

Can the undertaker maintain this special proceeding? Section 2727 of the Code of Civil Procedure provides that: "A petition praying for the judicial settlement of an account, and that the executor or administrator be cited to show cause why he should not render and settle his account, may be presented in a case prescribed in the last section by a creditor or a person interested in the estate or fund. * * *"

Section 2514, subd. 3, defines the words "debts" and "creditor" as follows: "The word 'debts' includes every claim and demand upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action; and the word 'creditor' includes every person having such a claim or demand."

Subdivision 11 of said section defines the expression "person interested" as follows: "The expression 'person interested,' where it is used in connection with an estate or a fund, includes every person entitled either absolutely or contingently to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee or otherwise, except as a creditor. * * *"

The jurisdiction of surrogates' courts must be exercised in the cases and in the manner prescribed by statute. Section 2472.

It seems that, under the decisions and under the definition above quoted, the holder of a claim for funeral expenses is not a "creditor" of the estate. These expenses are not to be treated as a "debt" against the decedent, but as a charge upon the estate, the same as the necessary expenses of administration. *Patterson v. Patterson*, 59 N. Y. 574, 585. See, also, cases above cited.

This rule is universally recognized by the text writers. *Croswell Ex'rs*, sec. 391; *Schouler Ex'rs*, sec. 421; *Woerner Adm'rs*, sec. 357; 2 *Williams' Ex'rs*, sec. 169.

Although the holder of a claim for funeral expenses is not a creditor of the estate, his claim is a first charge upon the assets of the estate and is payable with the other expenses of administration before the claim of any creditor of decedent. *Patterson v. Patterson*, 59 N. Y. 564; *Ferrin v. Myrick*, 41 id. 315. Does this make him a "person interested" in the estate or fund, within the meaning of that expression as used in the Code?

If it does, he is entitled to maintain this proceeding.

To be a "person interested" one must be entitled to "share" in the estate or the proceeds thereof, or in the fund.

Upon the facts above stated, is this petitioner now entitled to share with any one in the assets of the estate or the proceeds thereof? Is he entitled to share in the proceeds of this estate with the surviving brother of decedent? Under the above statement of law, it cannot be that he is.

He made his contract with the brother as an individual. He has his remedy for the collection of this claim. The law says his claim is against the brother individually. The cases hold that, under certain circumstances, equity will step in and help him to collect the claim out of the estate of decedent; but no facts are shown here requiring the aid of equity, and this is

probably not the tribunal in which the petitioner could obtain equitable relief, if he was entitled to the same.

In the administration of estates there seems to be two classes of persons created by the Code who may be entitled to participate in the distribution of the assets, namely, "creditors" and "persons interested." The creditors of an estate are entitled to be paid out of the proceeds thereof before there can be any distribution to the persons who are interested therein as "husband, wife, legatee, next of kin, heir, devisee, assignee, grantee or otherwise."

The law creates another class whose claims are a charge upon the estate, and who are entitled to be paid out of the assets before either "creditors" or "persons interested."

This class is composed of persons holding claims against the estate for expenses of administration. The cases hold that the expenses of administration are the funeral expenses, the expense of probating will or of obtaining letters of administration, the expenses of settling the estate, including necessary attorney and counsel fees.

All these charges, which are necessarily incurred, and which are reasonable in the amount, are to be first paid by the executor or administrator in the due course of administration.

Although these charges are not created by the contract of decedent, the law recognizes that they are incurred for the benefit of the estate; that there is, therefore, an obligation on the part of the estate to pay the same, and it makes them a first charge upon it. Keener Quasi Contracts 341, 344.

Upon the final judicial accounting of an executor or administrator, the common law gave the probate courts the power to allow the executor or administrator, out of the estate, the expenses which he had necessarily incurred in the course of administration. *Young v. Brush*, 28 N. Y. 667, 673.

The power was afterwards conferred by statute. See 2 Rev. St. 93, sec. 58.

And it is now provided in the Code that "in all cases such

allowance must be made for their necessary expenses actually paid by them as appears just and reasonable." Code Civ. Proc. sec. 2730.

But, so far as I can find, it has always been held by these courts that persons holding these claims cannot obtain payment of them by proceedings in a Surrogate's Court. *Hoes v. Halsey*, 2 Dem. 577.

Counsel for petitioner relies upon *Patterson v. Patterson*, 59 N. Y. 582; *Dalrymple v. Arnold*, 21 Hun, 110; *Laird v. Arnold*, 25 id. 4, and *Matter of Laird*, 3 St. Rep. 378, to support his contention that the petitioner is a creditor of the estate of decedent, and that he is also a "person interested" in the estate.

Patterson v. Patterson simply holds that one who has paid the funeral expenses of a decedent is entitled to set the amount of such payment up as a counter-claim in an action brought against him by the decedent's personal representative. This right is recognized by all the authorities.

The decision in the remaining cases seems to have been founded on chapter 267 of the Laws of 1874, which has been repealed by chapter 245 of the Laws of 1880. The provisions of chapter 267 of the Laws of 1874 do not seem to have been re-enacted in any of the subsequent statutes.

It is now held that the holder of a claim for funeral expenses is not entitled to maintain a proceeding for the sale of real estate to pay the same. *Matter of Corwin*, 10 Misc. Rep. 196.

Under the law as it now stands the estate of a person dying intestate is to be distributed as follows: (1) All charges upon the estate for expenses of administration are to be paid. (2) The creditors of the intestate are next to be paid. (3) The balance remaining after these payments is to be distributed among the "persons interested" in the estate as "husband, wife," etc., according to their respective interests.

The petitioner belongs to the first class. It follows that he is not, within the cases cited, and the definitions given in the Code, a "creditor" or a "person interested" in the estate. He

is, therefore, not entitled to institute these proceedings, and his petition must be dismissed.

Petition dismissed.

In the Matter of the Probate of the Will of JANE GASTEN,
Deceased.

(Surrogate's Court, Kings County, Filed February, 1896.)

LEGACY—ADEMPTION.

A legacy to a church for the purpose of paying off a mortgage thereon is not adeemed by a reduction of the mortgage before testator's death by subscriptions, except to the extent that subscriptions made by the testator contributed thereto.

Probate of will.

William Gasten, for proponent; Burr, Coombs & Wilson, for the Classon Avenue Presbyterian Church; Campbell & Moore, for the Board of Missions for Freedmen, etc., residuary legatees; James W. Glendenning, special guardian.

ABBOTT, S.—Jane Gasten died on the 22nd day of November, 1895, leaving a last will and testament which was duly executed on the 7th day of June, 1890.

On the probate of the will, construction under section 2624 of the Code is sought of the "first" paragraph, which reads as follows:

"First. I hereby give and bequeath to the Classon Avenue Presbyterian Church, in the city of Brooklyn, county of Kings, and State of New York, the sum of twenty-five thousand dollars (\$25,000), for the purpose of paying off the mortgage on said church or the chapel belonging thereto, which was assumed for the purpose of building said chapel."

At the time the will was penned, in 1890, there was a mortgage of \$25,000 on said Classon Avenue Presbyterian Church, no part of which had been paid off. Subsequently, however, at various times, certain sums were paid on said mortgage, amounting in the aggregate to \$11,000, so that at the time of the decease of the testatrix there was due and owing on said mortgage only the sum of \$14,000, with some interest.

The question to be determined is whether, under the said "first" clause of the will, the said church is entitled to the whole legacy of \$25,000, or to only so much thereof as will enable it to pay off the mortgage as it now stands.

The church, answering the petition for construction, alleges, among other things, "that subsequently to the execution of the said will, the sum of \$11,000 was paid on account of the principal of the mortgage in said will and said petitions referred to, of which payments the said Jane Gasten had knowledge, and toward making which payments she subscribed various amounts, yet, notwithstanding the said fact, the said Jane Gasten permitted her said will to remain unchanged and unaltered."

This allegation is not denied.

The counsel for the church rest on this answer, and have not presented to the court any brief to elucidate their view of the law.

The counsel for the residuary legatees present an elaborate brief, contending that it was the expressed intention of the testatrix to give a legacy of \$25,000, or so much thereof as might be necessary, to pay off the mortgage as it should exist at the time her will took effect, or, in other words, that the amount named was descriptive only, and the clause "for the purpose of paying off the mortgage on the church," etc., serves as a limitation of the bequest as well as explanation of its purpose.

After careful consideration of the brief and the authorities cited therein, I was, at first, inclined to take this view; but subsequent independent research has convinced me that it is

erroneous, and the proper disposition of this question depends upon a different rule from any cited by the learned counsel.

I have been unable to find any case in this State bearing directly upon the construction of such a clause as this, but in *Jarman on Wills* (5th Ed.), vol. 1, p. 694, the following rule is laid down:

“We are to consider whether, in cases where words are added expressing a purpose for which gifts are made, such purpose is to be considered obligatory. Where the purpose of the gift is the benefit solely of the donee, himself, he can claim the gift without applying it to the purpose, and that, it is conceived, whether the purpose be in terms obligatory or not. Thus, if a sum of money be bequeathed to purchase for any person a ring, or a life annuity, or a house, or to set him up in business, or for his maintenance and education, or to bind him apprentice, or toward the printing of a book, the profits of which are to be for his benefit, the legatee may claim the money without applying it or binding himself to apply it to the specified purpose; and even in spite of an express declaration by the testator that he shall not be permitted to receive the money. *Apreece v. Apreece*, 1 Ves. & B. 364; *Dawson v. Hearn*, 1 R. & My. 606; *Ford v. Bately*, 17 Beav. 303; *Knox v. Hotham*, 15 Sim. 82; *Gough v. Bult*, 16 id. 45; *Webb v. Kelly*, 9 id. 472; *Barlow v. Grant*, 1 Vern. 255. In *Lockhart v. Hardy*, 9 Beav. 379, it was held that a legacy to a devisee to pay off a mortgage debt on the estate devised to him was held good, though the mortgage was foreclosed in the testator’s lifetime.

“These cases rest on the principle that the court will not compel that to be done which the legatee may undo the next moment, as by selling the thing to be purchased or giving up the business.”

This rule, in my opinion, is the proper one to be applied in this case, and the whole amount of the legacy should be paid to the church, irrespective of the purpose.

I have no doubt that the principle of ademption applies to

this legacy in so far as it has been reduced by the subscriptions of the testatrix towards paying off the mortgage, but it applies no further, as there can be no ademption by strangers. Roper on Legacies, 380.

I will order a reference in this matter to ascertain the amount subscribed and paid by the testatrix toward the reduction of the church mortgage; and when this is ascertained, a decree may be presented providing for the ademption of the legacy accordingly.

Ordered accordingly.

In the Matter of the Estate of FREDERICK WACHTER, Deceased.

(*Surrogate's Court, Cattaraugus County, Filed February, 1896.*)

1. GIFT—DELIVERY.

The nature of the delivery essential to constitute a gift depends on the character of the thing given and the relative situation of the parties.

2. SAME—POSSESSION.

Where the gift has been made complete, subsequent possession of the donor, if satisfactorily explained, will not divest the title of the donee.

3. EXECUTORS—ALLOWANCE FOR WIDOW.

The widow's right to support for forty days is not limited to the amount set apart for her in the inventory, but she is entitled to reasonable sustenance for that period.

4. SAME—FUNERAL EXPENSES.

A reasonable expenditure for mourning for the widow and minor daughter is a legitimate part of the funeral expenses.

Proceedings on judicial settlement of accounts of administrator and proof of personal claim.

N. M. Allen, for administrator; W. K. Harrison, for contestant.

DAVIE, S.—The contestant seeks to charge the administratrix with the value of certain personal property, a horse and buggy and a quantity of blacksmith tools, which, as is alleged, belonged to the intestate and are not accounted for. It is asserted on behalf of the administratrix that the intestate, prior to his death, had parted with the title to this property; that he had given the horse and buggy to his daughter Julia, and the blacksmith tools to a son. The evidence clearly shows a design on the part of the intestate of making such gifts and an express declaration thereof; the gifts were fully consummated so far as the mere words of gift are concerned; the only question which arises is as to whether or not there was such a delivery of the property sought to be given as the law requires in order to constitute a valid gift *inter vivos*.

The horse and buggy in question were kept upon the farm occupied by the intestate and family; the daughter, Julia, had always resided at home and at the time of the alleged gift was a minor. The administratrix testified that "Deceased gave the horse and buggy to Julia when she was nineteen years old; that was three years ago last November. She worked for the deceased in haying; Julia always took charge of the horse after deceased gave it to her; after deceased gave the horse and buggy to Julia he used it some but would call on Julia to hitch up her horse; did that some before he gave it to her, but not so much; the stuff to keep the horse from all came from the farm." The daughter, Julia, testified: "I used to take care of the horse and hitch it up and drive it for several years; deceased drove it more or less; there came a time when I took care of the horse exclusively; that was for two months before father died; I drove whenever and wherever I chose without asking permission." The witness Dennis Wachter testified: "I heard the deceased say that my sister was the one who owned the horse; he said that when I asked him for it; he told me to ask her for it." Frank Wachter testified: "I asked him" (the intestate) "for the horse and he told me it belonged to Julia; that he had given

it to her; that she had always helped him through haying and he had made her a present of it." This was substantially all the evidence bearing upon the question of the making of the gift and the delivery.

It is undoubtedly the law that in order to constitute a valid gift there must be a delivery of the property with the intention to give; the donor must part with the dominion and control of the thing before the gift can take effect. Mere words of gift alone are not sufficient and are not the basis of any action. *Martin v. Funk*, 75 N. Y. 134; *Gray v. Barton*, 55 id. 68.

The nature of the delivery must, however, necessarily depend to some extent upon the character of the thing given, and the relative situation of the parties. Where the articles are numerous and not susceptible of actual manual delivery a symbolical delivery is sufficient. *Am. and Eng. Enc.*, vol. 8, p. 1315.

In one case it was held a sufficient delivery to constitute a valid gift to a married woman of household furniture in the possession of herself and family where one who had just purchased under a chattel mortgage made by her husband, pointing out certain articles to the wife, said: "I give you these and all the property I have this day purchased," and that such property remaining after the gift in the house occupied by the husband and wife together was to be deemed in the possession of the wife. *Allen v. Cowan*, 23 N. Y. 502.

In a case where a father had purchased a lottery ticket which he declared he gave to his infant daughter and wrote her name upon it and after it had drawn a prize declared he had given the ticket to the child, it was held that the prize money was hers. *Grangiac v. Arden*, 10 Johns. 293.

In another case the plaintiff and her brother lived with their father on his farm; the brother, on account of the infirmities of the father, had the whole management of the farm and provided for the common household; the carriage in question was kept in the carriage-house when not in use; the father called the members of the family together and in the presence of all gave the

carriage to the plaintiff, requesting all to witness the gift. The brother afterward took the carriage, claiming that the father had given it to him, and it was held that if there was, under the facts of the case, a declaration of a gift in plain terms and a surrender and acceptance of dominion, it was a sufficient delivery. *Fletcher v. Fletcher*, 45 Am. Rep. 627. See, also, case of *Penfield v. Thayer*, 2 E. D. Smith, 305.

After the gift is made complete it is not necessary that the donee retain the possession of the property; the subsequent possession by the donor, while it may throw suspicions on the transaction as being a fraud against creditors, if satisfactorily explained, will not divest the donee of the title to the property when it has once been lawfully acquired by him. Am. and Eng. Enc., vol. 8, p. 1317.

Under all the facts disclosed by the evidence it is entirely apparent that the intestate designed to give the property in question to the daughter; that he subsequently recognized her control and dominion over it; that she did exercise acts of ownership over the property. There is no evidence that the intestate ever made any claim to the property after the gift to the daughter; consequently, it seems quite clear that it should be held that the daughter's title to this property had become perfected and was in all respects valid.

The authorities above cited and the conclusion reached are entirely applicable to the transaction between the intestate and his son regarding the blacksmith tools; the making of the gift and the assumption of dominion on the part of the donee in this instance are quite clearly established; consequently, the administratrix should not be charged with the value of any portion of this property.

In the account filed the administratrix charges the estate with the expense of her maintenance during the forty days immediately following her husband's death; also with the amount expended by her in the purchase of mourning apparel for herself and minor daughter; these charges are objected to.

An inventory of the personal estate of the deceased was made and filed and the portion of the assets to which the widow was entitled properly set off to her, including such family supplies as were on hand at the time. It is claimed on the part of the contestant that the widow's right of support during her quarantine should be limited to the property so set apart to her; this claim is not sustained by the authorities. The widow is entitled to her reasonable sustenance out of the estate of her husband during her quarantine by the express provisions of the statute. R. S. (8th ed.), vol. 4, p. 2456; *Johnson v. Corbett*, 11 Paige, 265.

A more novel and peculiar question, however, arises in relation to the expense incurred by the widow in the purchase of mourning attire.

No claim is made that such expense was unreasonable considering the extent of the estate, so the abstract proposition arises as to whether or not a reasonable expenditure for mourning apparel for the widow and minor daughter should be regarded as a legitimate part of the funeral expenses.

Reasonable funeral expenses are always regarded as a proper charge against the estate, but does the term include an expenditure for the purpose indicated?

The term "funeral" embraces not only the solemnization of interment but the ceremonies and accompaniments attending the same; such ceremonies are prompted by affection and their character are to some extent determined by the religious faith and sentiment of the friends of the deceased; their extent and magnitude depending upon the condition of the estate and the station in life which had been occupied by the deceased, varying from the simple bier to the imposing catafalque, from the informal liturgical service or scriptural reading for the humble to the elaborate *orisons funebres* attending the obsequies of the renowned.

The wearing of suitable mourning apparel is commonly regarded not only as a proper, but almost indispensable mark of

affection and evidence of grief; the distribution of a decedent's estate among his next of kin without providing therefrom for the usual and conventional ceremonies in memory of the dead would seem not only parsimonious, but utterly repugnant to one's conception of justice and propriety.

In the Matter of Allen, 3 Dem. 524, this same question was considered and an expenditure of this character allowed from the estate, and I am of the opinion that the conclusions reached in that case were entirely right. A decree will be made and entered judicially settling the account of the administratrix as filed.

Ordered accordingly.

In the Matter of the Judicial Settlement of the Accounts of
SPENCER CLINTON et al., as Executors, etc., of HARRIET A.
BENNETT, Deceased.

(*Surrogate's Court, Erie County, Filed February, 1896.*)

1. TRUSTEES—COMMISSIONS.

Where executors hold a fund as trustees with power to expend as much thereof in the support and care of the *cestui que trust* as they shall deem judicious, and there is no provision as to the disposition of the remainder, and the *cestui que trust* dies before the executors have settled their accounts, they are entitled, as trustees, to commissions only upon the amount actually expended by them for the support of the *cestui que trust*.

2. EXECUTORS—COMMISSIONS.

No values can be estimated on land in order to fix commissions in advance of its conversion into money, nor can commissions be allowed on unsold lands.

3. SAME.

The value of the unadministered estate may be shown for the purpose of determining whether commissions may be allowed to each executor, but they are not entitled to more compensation than for the moneys actually received and paid out.

Proceedings for judicial settlement of accounts of executors.

Adolph Rebadow, for Spencer Clinton and others; Clark H. Timmerman, for infant legatees.

MAROUS, S.—This is a proceeding for an accounting, in which the principal questions to be determined arise from certain claims made by the executors and trustees for commissions under the statute.

The amount involved and the question to be considered lead me to give my reasons for reaching conclusions hereinafter expressed.

The executors and trustees of this estate claim each to be entitled to full compensation in both capacities, on the ground that, as trustees, they became entitled, under the will of decedent, to charge commissions when their duties as such trustees became ended and terminated by the death of David S. Bennett, and that since the death of David S. Bennett they became and are entitled to charge commissions as executors, and also to be allowed commissions on the value of certain real estate devised to them in trust, and remaining unsold at the present time.

Harriet A. Bennett died on the 2d day of February, 1894, leaving a will, which was proved, and letters testamentary issued to Spencer Clinton, Truman G. Avery and Georgiana W. Jenks, as executors. They entered upon the discharge of their duties, and now present their account for judicial settlement.

No objections are made to the account, and the same must therefore be allowed as filed.

To the claims of the executors for commissions as trustees, the special guardian for the infant legatees objects.

The account shows that the personal estate of the testatrix amounted to \$66,299.29; her real estate being the Bennett elevator, valued at \$500,000, and an income thereof since her death, amounting to \$94,606.21.

If the claim of the learned counsel for the executors is good,

then two commissions must be allowed to each of the three executors, in the two capacities of trustees and executors, amounting to about \$36,000, for their services.

This matter has been presented and briefs filed upon the theory that the test alone is, in this case, whether the duties of the offices of executors and trustees are "interwoven, inseparable and blended together," or whether they were separable, distinct and not coexisting. Under item three of the will of the testatrix, the following words are used: "I give, devise and bequeath all my estate, both real and personal, including all claims and demands which I may possess, not hereinbefore devised, to my executors hereinafter named, as trustees, to have and to hold the same upon the following trust: To apply the income thereof, and so much of the principal thereof as, in their judgment, shall be judicious, for the care, support and maintenance of my husband, David S. Bennett; and I give them full power and authority to use the whole of said principal and income for that purpose, if, in their judgment, it shall be advisable to do so to secure his happiness and comfort." The counsel for the executors claim that they are entitled to compensation as trustees, upon the proposition that this trust is separable and distinct from the administration of the estate; while the special guardian contends that the two functions seem to co-exist during the whole duration of the trust; that the duties of the executors do not cease before those of the trustees begin; and, further, that the will provides that the estate should go first into the hands of the executors, for the purpose of carrying out items one and two, and then to the trustees, for the purpose of carrying out item three, and then again into the hands of the executors, for the purpose of carrying out the remainder of the provisions of the will, making the trust an incident to the duties of the executors, which began before the commencement of the trust, and continued through its whole duration and after its determination.

In the view I take of this matter, I deem it unnecessary to

determine whether the functions and duties of the executors as such, on the one hand, and as trustees, on the other, are separable and distinct.

The executors are not accounting as trustees. The death of David S. Bennett, which occurred on the 6th day of November, 1894, terminated the trust, and the duties, powers and functions of the trustees thereupon ceased. Undoubtedly, they would have had the right to expend the entire estate, under the trust, for his benefit, if they had deemed the same judicious, for they had the authority to do so. But they did not.

The estate goes back from the trustees to the executors, by operation of law; for the trust does not mention or direct what shall be done with the residuum of the trust estate after the death of David S. Bennett. The trustees took title only to so much of the estate as was expended for the care and support of the *cestui que trust*, and they are entitled to commissions *pro tanto*.

The estate of the trustees took priority over the estate of the executors only for the purpose of the trust, and to no greater extent, and the unsold lands, being the Bennett elevator, passed upon the termination of this trust to the executors.

The counsel for the executors argues that the executors, as trustees, are entitled to commissions upon the entire estate comprehended by the trust, if the trustee had expended but 50 cents for the *cestui que trust*, and he then had died before any further expenditure had been made by the trustees in his behalf. I cannot agree to such a contention. Under the common law, a trustee was entitled to no compensation; but the statute now gives commissions, but always upon the assumption that something has been done by the trustees to entitle them to the same, and that services of some kind were rendered.

Nowhere in the account in this case (which must be regarded as a distinct admission of all matters stated therein) can be found a payment or transfer of any property as trustees. There are no vouchers, receipts or payments in this large account made

as trustees, unless it be the small sum charged to the account of David S. Bennett, amounting to \$236.25, and the household expenses, amounting to \$2,339.04; and, while doubt might be expressed as to these amounts, I am satisfied to allow and recognize the expenditures of these sums by the executors in their capacity as trustees.

The trustees took such an estate only as was commensurate with their trust, and commissions can be computed only to such an extent.

Any other view would result in paying for services not rendered; and to allow to the executors, as trustees, the sum of about \$18,000, upon the theory that they had the right to convert the estate comprehended by the trust, but which they did not do, because of ample means from other sources to maintain the *cestui que trust*, would be injecting life into a dead trust, with no other purpose than to enrich these executors, as trustees, for services never performed.

The counsel for the executors sought, upon the hearing, to estimate the value of the unsold real estate, in order to fix a basis for computing the commissions of the trustees, and such testimony showed the elevator property to be worth, taking the minimum amount given, \$500,000.

The case of *Phoenix v. Phoenix*, 28 Hun, 629, cited in the brief of counsel for the executors, which held: "In a trust of this nature, where the entire control and management of the real estate is confided to the trustees, the decisions are uniform in holding that their commissions are to be cast upon the value of the real estate, as a safe, prudent and uniform mode of ascertaining the value of the services rendered by the trustees,"—was reversed in *Phoenix v. Livingstone*, 101 N. Y. 451, as to the allowance of commissions upon the value of unsold lands.

No values can be estimated in order to fix commissions in advance of conversion into money, nor can commissions be allowed on unsold lands. The mere holding of title will not be deemed money for the purpose of computing commissions. Estate of

McLaren, 6 Misc. Rep. 483; *Phoenix v. Livingstone*, 101 N. Y. 451.

The rule laid down in the case of *McAlpine v. Potter*, 126 N. Y. 290, 291, clearly decides that no commissions can be based upon estimated values.

Since there is nothing but unsold elevator property claimed by the trustees on which to base commissions, none could be allowed the trustees until actual conversion into money or its equivalent. There was no "receiving and paying out any moneys," which acts are essential before commissions can be allowed.

The special guardian also objects to the executors each receiving full commissions on the ground that the personal property, as shown by the account of the executors, does not amount to \$100,000, or more, over all her debts, and thus come within section 2736 of the Code of Civil Procedure, so that each of the three executors may be entitled to full commissions.

I cannot agree with him in this contention. While it is true that the account does not show the personal property of the testatrix to have been of the value of \$100,000 or more, yet by adding the value of the elevator property of which she died seized, and which remains unsold, the total value of her property will then largely exceed \$100,000.

An examination of the will satisfies me that the testatrix directed a conversion of the elevator property. The will directs a sale of all of her real estate. The duty is obligatory, and by virtue of such direction, under the well-known rule of conversion, the real estate becomes personalty as of the time of her death. *Stagg v. Jackson*, 1 N. Y. 212; *White et al. v. Howard et al.*, 46 id. 162; *Greenland v. Waddell*, 116 id. 240; *Redfield Prac., Canon of Interpretation*, 14.

Although the moneys actually received by the executors do not exceed \$100,000, yet, for the purpose of ascertaining the value of the personal property over all debts, evidence was properly given to show that the remainder of the unadministered

estate will exceed \$100,000, so that the court can determine whether the allowance should be a full compensation to each executor, or a full compensation to all; but the executors are entitled to no more compensation than for moneys actually received and paid out.

The executors can, therefore, only be entitled, on this accounting, to commissions on the moneys actually received and paid out.

I therefore conclude to allow to each executor full commissions upon the moneys actually received and paid out, as shown by their account, and to allow a single commission in their capacity as trustees upon the amount expended in behalf of David S. Bennett.

The individual claims of the executors against the testatrix, proved before the surrogate, are allowed as proven.

Ordered accordingly.

Note.—This decision was affirmed on appeal in 12 App. Div. 132.

In the Matter of the Estate of SOPHIA HALL, Deceased.

(*Surrogate's Court, Cattaraugus County, Filed February, 1896.*)

1. EXECUTORS—LIABILITY.

An executor or administrator is not liable for failure to take legal steps to recover alleged assets of the estate, where there were reasonable grounds for believing that such steps would be entirely ineffectual and he acted in good faith.

2. GIFTS CAUSA MORTIS—MENTAL CAPACITY.

One who has testamentary capacity is competent to make a gift *causa mortis*.

3. SAME—SUBJECTS OF.

A certificate of deposit is a proper subject of a gift *causa mortis*.

4. SAME—DELIVERY.

A delivery to a third person for the donee is sufficient, although the donor dies before the property is handed to the donee.

Proceedings on judicial settlement of accounts of administrator.

W. R. Pinder, for administrator; Hudson Ansley, for contestant.

DAVIE, S.—Sophia Hall died intestate August 15, 1895, leaving her surviving her husband, but no other relatives or next of kin; the husband died intestate soon after, leaving him surviving one son, the administrator, and two daughters, one of whom is the contestant.

Shortly prior to her death the decedent was the owner of certain funds on deposit in two banks, such deposits being evidenced by the usual certificates, and amounting, in all, to the sum of \$1,350. The administrator does not charge himself with, nor account for, these certificates, and the objections filed relate solely to such omission.

It is claimed, on the part of the administrator, that the decedent gave these certificates away shortly prior to her death, while it is urged, on behalf of the contestant, that at the time of the alleged gift the decedent did not possess the requisite mental capacity to make a gift; that the funds represented by such certificates belong to the estate, and that it was the duty of the administrator to resort to proper methods for recovering the same, and having failed so to do, he is personally liable as for a *devastavit*.

This being the nature of the controversy, it is entirely apparent at the outset that the administrator cannot be charged personally with these funds unless he has failed to exercise the diligence required by law of administrators in the management of estates, and that in consequence of such neglect the estate has sustained loss.

This leads to the inquiry, first, as to the degree of care and diligence required of representatives in their efforts to collect demands due or to recover the possession of property belonging to the estate.

It has been asserted as a general proposition that in the management of the business of the estate executors and administrators are bound to act in good faith and to exercise such skill, prudence and diligence as men ordinarily bestow upon their own affairs of like nature. Am. & Eng. Ency., vol. 8, p. 347; McCabe v. Fowler et al., 84 N. Y. 314; King v. Talbot, 40 id. 76.

They may be guilty of *devastavit* not only in consequence of direct acts of abuse or maladministration, but by culpable negligence in the management of their estates. Schultz v. Pulver, 11 Wend. 363; Harrington v. Keteltas, 92 N. Y. 40.

It is quite apparent that the funds in question could not have been recovered except by an action, but that fact itself does not relieve the administrator. If, however, an examination of all the facts discloses reasonable grounds for considering that such legal steps would have been entirely ineffectual, then such failure on the part of the administrator, acting in good faith, does not render him liable. Clack v. Holland, 19 Beav. 262-71; O'Conner v. Gifford, 117 N. Y. 275.

If the decedent parted with the title to these funds at all it was by way of gift *causa mortis*, and it is claimed by the contestant that at the time of the transaction decedent had become so enfeebled mentally in consequence of her physical infirmities as to be incapable of transacting business, and that the transaction itself lacked some of the essential features of a gift of that character.

In order to make a valid gift *causa mortis*, there must, of course, be a donor possessing requisite mental capacity, and in apprehension of impending dissolution; property, the title to which is susceptible of being transferred by gift; the words of gift indicating an intention to pass title, coupled with a delivery and an acceptance on the part of the donee.

The policy of the law does not favor gifts of this character (Am. & Eng. Ency., vol. 8, p. 1348n); such gifts are not favored by the courts and their range should not be extended (Bliss v. Fosdick, 86 Hun, 162); they are necessarily open to

the objection of uncertainty, and great strictness and clear proof are, therefore, necessary to establish them, and they can only be upheld where the intention of the donor is clear and definite and such intent is fully carried out by execution (*Harris v. Clark*, 3 N. Y. 93-121; *Grey v. Grey*, 47 id. 552; *Grymes v. Hone*, 49 id. 17), but the rule is not carried to the extent of holding that the presumption of law is against such gifts. *Lewis v. Merritt*, 113 N. Y. 390.

It will be well to have these general propositions in mind in examining the evidence in this case.

Did decedent possess the requisite mental capacity at the time of making this gift?

It was conceded on the submission of this case that if decedent possessed testamentary capacity she was competent to make a gift *causa mortis*; the grade of mental ability required to make a testamentary disposition of property is quite clearly defined. One capable of comprehending the condition of his property and his relations to those who are the natural objects of his bounty and able to collect and retain in mind without prompting the elements of his business possesses testamentary capacity. *Van Guysling v. Van Kuren*, 35 N. Y. 70.

Decedent was a woman of somewhat advanced age. During the last six months of her life she was afflicted with cancer of the liver. The transaction in question occurred on Sunday afternoon and on Monday evening, and decedent died the following Wednesday morning. Several witnesses, who were with her more or less during her last days, were examined quite fully as to her condition; these witnesses detail various conversations with her showing undoubted intelligence; on Sunday Mrs. Trippe, the wife of decedent's pastor, called to see her; decedent said she was glad to see her and spoke of feeling better than she did the day before; she asked if Mrs. Trippe's husband was at home and when he would be; she spoke of a box and a letter she had received from her stepdaughter and wished the box brought and the letter read to her; she examined the contents

of the box and told Mrs. Trippe of her desire to present her with a resurrection plant; she talked of her stepdaughter, Mary Cowles, and of her kindness to decedent; she told Mrs. Trippe of a small gold piece that she desired to give to Mrs. Trippe's child, and conversed on the subject of her property as more particularly hereafter referred to.

The witness, Louisa Ainsworth, watched with decedent on Sunday night; she says she conversed with her and that she asked for what she wanted; she asked for a pocket handkerchief and on one being brought said, "No; not that one; a pink-bordered one." As she was being moved in bed near morning her purse dropped down by the bed and she spoke of it, and asked the witness to pick it up and count the money and put the purse under her pillow; she inquired how much there was in the purse, and being told \$2.50, said that was right.

The witness, Fannie Ainsworth, was with the decedent during the period in question and spoke of conversations with her, all indicative of reason and understanding. The attending physician visited her on the day before her death and conversed with her, and he testified, "She answered my questions in a perfectly sane manner, as a sane person would; I didn't think she was other than perfectly sane."

I have referred to but a small portion of the evidence bearing upon this question, but a careful consideration of all the testimony irresistibly leads to the conclusion that the decedent, at the time in question, possessed testamentary capacity.

It appears, inferentially, though quite satisfactorily, that decedent had for some time entertained the intention of making the disposition of the certificates which it is claimed she did make; that such disposition was in accordance with a design long cherished by her; the witness, Jennie Kelsey, testified that she was at the decedent's residence about the 4th of August, 1895, just before she was confined to her bed, and that decedent, quoting from her testimony, "had some papers to sort over and fix up; and so she took them and went to work; and I saw

she was getting very tired, and I tried to persuade her to lie down awhile, and she said it was probably the last work she would have to do, and she went out to dinner and came back and went to work and she arranged them and put them in a pan and told me to put them in another room under the bureau." The witness did so.

Fannie Ainsworth testified that she was with decedent on Sunday before her death and that decedent told her of some papers that were in a pan under the bureau in her room. "She said that she wanted to give them to Mrs. Trippe to take care of; she requested me to be there with Mrs. Trippe and see that she had them and took them away with her; after Mrs. Trippe had gone, she asked me if Mrs. Trippe took all the papers. I told her that she did, all that were there. She told me to tell Mrs. Trippe to divide it equally between the Home Mission and the Foreign Mission and the Bible Society. She said they were certificates—money that she and Mr. Cowles" (her former husband) "had saved for the missionaries." This witness also testified that she gave the papers to Mrs. Trippe in decedent's presence and at her bedside, and that decedent said they were for the missionaries.

The witness, Sarah Trippe, testified that she visited decedent on Sunday and that she, decedent, asked Miss Ainsworth to bring out the papers, which was done; and witness, at the request of decedent, figured them up, saying they amounted to \$1,350, and decedent said that was right. Witness then asked if she wished her to take the papers with her and decedent said, "Yes," and quoting from her evidence, "I asked her what proportion she wished us to give the societies; before this she remarked like this—'during Mr. Cowles' lifetime we arranged together that eventually this money should go to the boards, and after Mr. Hall and I were married there was the same understanding between us, that the money should go to the boards;' I asked her what boards, and she said the Home Mission Board,

the Foreign Mission Board and the Bible Society; I carried the papers away with me."

The decedent was a Christian woman and a member of the Presbyterian church; her first husband was a minister of the same denomination; her last husband, Mr. Hall, was also a minister of the same denomination, and for many years engaged in missionary work; so it is entirely obvious that the decedent's associations and surroundings for many years had been of such a character as to originate testamentary intentions in harmony with the disposition claimed to have been made by her of her small estate.

These certificates were proper subjects of a gift *causa mortis*; under the law as it now stands all kinds of personal property, with very few exceptions, may be the subject of such a gift; whether the property be corporeal or incorporeal (Am. & Eng. Ency., vol. 8, p. 1342); bills, bonds and promissory notes and all other evidences of debt, although payable to order and not indorsed, may be so given. Am. & Eng. Ency., vol. 8, p. 1343. In *Walsh v. Sexton*, 55 Barb. 251, it was held that a delivery of certificates of stock is good as a gift *causa mortis* without an assignment or without a completed transfer of the legal title. This authority was cited and applied in *Grymes v. Hone*, *supra*.

This transaction having taken place in view of the decedent's approaching dissolution, it is clear that all the essential conditions existed for making a valid gift *causa mortis*. This brings us to a consideration of the remaining question, as to whether or not decedent's intentions were effectuated by such a delivery of the certificates as the law requires to complete a gift of this character.

The subject of a gift *causa mortis* must be delivered or the gift is not valid (Am. & Eng. Ency., vol. 8, p. 1347); there must be some act done to change the possession from the donor to the donee; the donee or some one for him must not only take, but must retain possession until the death of the donor; if it comes again into the possession of the donor the presumption is

that the gift is revoked. *Cutting v. Gilman*, 41 N. H. 147; *Craig v. Craig*, 3 Barb. Ch. 76; *Emery v. Clough*, 63 N. H. 552.

These certificates were delivered by Mrs. Trippe to her husband, who went to decedent's residence on Monday evening in company with his wife, where the certificates were indorsed by decedent, she making her mark to her name written on the back of each, such mark being witnessed by Miss Ainsworth and by Mr. Hall, the administrator; at no time did decedent have either of the certificates in her possession except for the purpose of indorsement after they were delivered to Mrs. Trippe. Mr. Trippe took them away with him after such indorsement. But the money represented by them was not drawn from the banks or paid over to the beneficiaries until after decedent's death.

It has been distinctly held in many cases that the delivery may be made to a third party for the donee, and that such delivery will be sufficient although the donor dies before the intermediary hands over the property. *Drury v. Smith*, 1 P. Wms. 404; *Michener v. Dale*, 23 Pa. St. 59; *Dresser v. Dresser*, 46 Mo. 422; *Jones v. Deyer*, 16 Ala. 221.

In *Grymes v. Hone*, above cited, the defendant's testator, being the owner of 120 shares of bank stock included in one certificate, made an assignment of twenty shares to the plaintiff; this he handed to his wife to be kept by her and delivered to the plaintiff upon his death; the court held that this constituted a valid gift *causa mortis*; that the defendant, the wife, was the trustee for the plaintiff by operation of law.

In view of all the facts disclosed by the evidence in the light of the various authorities cited, I am impressed with the belief that the administrator has furnished a complete and satisfactory answer to the objections filed to his account; that an action brought by him to recover these funds would have been entirely ineffectual; that he has not only acted in good faith, but exercised good judgment in not involving the estate in litigation.

A decree will be accordingly entered settling the accounts of the administrator as filed and dismissing the objection to the same.

Ordered accordingly.

In the Matter of the Probate of the Will of MARY METCALF,
Deceased.

(Surrogate's Court, Cattaraugus County, Filed February, 1896.)

1. TESTAMENTARY CAPACITY.

Incapacity to make a will will not be inferred from advanced age nor from an enfeebled condition of body and mind.

2. SAME—DECLARATIONS.

Where the testator undoubtedly possessed testamentary capacity at the time of the execution of the will, his declarations made before or after that time are not admissible to show fraud or undue influence.

3. WILL—KNOWLEDGE OF CONTENTS.

Where testator was able to read writing and to transact business, his knowledge of the contents of the will may properly be inferred.

Proceedings on proof of will.

Ralph B. Laning and James H. Waring, for proponent;
Henry Donnelly, for contestant.

DAVIE, S.—Mary Metcalf died on the 31st day of October, 1895, at the age of seventy-seven years, leaving her surviving no husband, but three sons and three daughters, her only heirs and next of kin. She possessed at the time of her death personal estate of the value of \$2,500. By the provisions of her will, which was executed on the 2d day of September, 1895, she bequeathed to her daughter, Mrs. Van, the sum of \$300, as compensation for services rendered by Mrs. Van for the testatrix. The residue of her estate she bequeathed equally to all of

her children except the contestant, Levi D. Metcalf, who is not a legatee.

A methodical examination of the propositions involved in this contest leads, first, to a consideration of the mental condition of the testatrix at the time of the execution of the will. Did she possess testamentary capacity within the meaning of the authorities defining the grade of mental ability requisite to execute a will? Testatrix died from cancer of the face, which began to develop about six months prior to her demise; at the time of the execution of the will she was somewhat enfeebled physically in consequence of the progress of the disease. She was not, however, confined to her bed, but was able, with assistance, to move about the house; she was a woman of strong will, ordinarily intelligent and of fair business capacity; within a day or two after the execution of the will she was attended by Dr. Bixbee, who had known her for many years; the disability imposed upon the doctor by section 834 of the Code was properly waived and he was examined quite fully as to her physical and mental condition. He said, quoting from his testimony, "I asked her if it" (the cancer) "pained her; she said, no; but the weight and inconvenience of it bothered her and made her nervous and she wanted to get it out of the way; wanted me to take it off; I objected to it because I did not think it advisable; her general health seemed quite fair, although she was weaker than when I had seen her before; she did not complain of pain or any distressing symptoms, but she talked about as well as usual—she talked intelligently; and about as she usually did when I had seen her previously; she was naturally inclined to joke and she would get her jokes off just as she used to years ago." He further testified that he conversed with her so as to determine her mental condition, and that she was of sound mind; that he saw nothing to indicate anything to the contrary; that she told him that, "She had got her will made all right—if that thing was going to kill her she was ready."

The attesting witnesses testified distinctly that she was of

sound mind; the other witnesses detail conversations with her shortly before and after the making of the will and, while they speak of her enfeebled physical condition, they say her conversation was intelligent.

The courts have held that there is no presumption against the validity of a will because made by a person of advanced age, nor can incapacity to make a will be inferred from an enfeebled condition of body and mind. *Horn v. Pullman*, 72 N. Y. 269. It has been asserted as a general proposition that one capable of comprehending the condition of his property and his relations to those who are the natural objects of his bounty, and able to collect and retain in his mind without prompting the elements of his business, possesses testamentary capacity. *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Matter of Carver*, 3 Misc. Rep. 573.

An application of these authorities to the evidence relating to the mental condition of the testatrix absolutely refutes the allegation of lack of testamentary capacity, so the remaining questions in this case must be determined, having the fact in view that the testatrix at the time of the making of the will was of sound and disposing mind.

It is, however, urged with considerable earnestness on the part of the contestant that the execution of the will in its present form was the result of undue influence or of ignorance on the part of the testatrix as to its contents. The circumstances upon which this claim is predicated are that by the provisions of the will the elder son is absolutely disinherited without any substantial reason appearing therefor, and that shortly prior as well as subsequent to the execution of the will the declarations of the testatrix in regard to her testamentary intentions and in regard to the disposition she had made of her estate are contradictory to the provisions of the will.

The testatrix had the undoubted right to make such a disposition of her estate as she saw fit; it is unnecessary to speculate as to her motives if it satisfactorily appears that the will repre-

sents her testamentary wishes. No presumption against the genuineness of this will arises from the fact that its terms are harsh or unjust. *Matter of Tracy*, 11 N. Y. St. Repr. 103; *Van Pelt v. Van Pelt*, 30 Barb. 134; *La Bau v. Vanderbilt*, 3 Redf. 384; *Matter of Jones*, 5 Misc. Rep. 200.

But what effect is to be given to her declarations?

The witness Chapman testified of having heard a conversation between the contestant and testatrix at her residence in the month of August, 1895, in which she said, "Levi, I want you to take a chair and come up here to my bed; I wish to talk with you; they have been harassing me to make a will, and if I do so I suppose I will have to do it soon; I have a new buggy here and I have given it to Jane—she has cared for me; I have been with her and she has waited on me and done lots that the other girls couldn't do and they haven't been here; I want to pay her or leave enough to her to make it satisfactory; and the balance I want equally divided among all of you children, and if you properly take care of what is left of your father's estate and this it will buy you a good home."

The testimony of this witness was corroborated by his wife and the witness Ada Grant, who each heard the same conversation.

The witness Amelia Metcalf, the wife of the contestant, testified that she visited the testatrix on the 4th day of October, 1895, and in detailing a conversation between them says, "She" (testatrix) "said they have been hounding me about making a will and so I made it the best I could; you tell Levi for me that what he can save out of his father's share and what he has out of mine will be something toward buying him a home; she told me to tell him that his share was on interest and good interest; she said, outside of Mrs. Van—she had given the buggy to Mrs. Van and she wanted her to have pay for her trouble—outside of that she had her property divided equally or wanted it that way."

This same conversation was testified to by the witness Mrs. Cornwall.

These declarations have been set forth in full in order that their full force and effect may be considered, as it is urged by the contestant that they are not only competent, but sufficient, to show that fraud or deception was practiced upon the testatrix and that she did not wish or intend to exclude the contestant from participation in the distribution of her estate.

It has been held that where the probate of a will is contested on the grounds of fraud, duress, imposition or other like cause not drawing into question the testator's mental capacity at the time of its execution, neither his prior or subsequent declarations are competent. *Waterman et al. v. Whitney et al.*, 11 N. Y. 157.

In *Jackson v. Kniffen*, 2 Johns. 31, the plaintiff sought to maintain his claim as an heir at law and the defendant as a legatee under the will of David Kniffen; some very substantial evidence had been presented on behalf of the plaintiff showing that the will had been obtained by duress, and the plaintiff sought to show the declarations of the testator to the effect that the will had been extorted from him by threats and duress; the court held such evidence to be inadmissible; THOMPSON, J., says: "This will might have been executed under circumstances which ought to invalidate it, but to allow it to be impeached by the parol declarations of the testator himself would, in my judgment, be eluding the statute and an infringement upon well-settled and established principles of law."

In *Marx v. McGlynn et al.*, 88 N. Y. 374, the court says; "Such declarations, whether made before or after the execution of a will, are competent as bearing upon the testator's mental capacity; they are also competent as bearing upon the condition of the testator's mind with reference to the objects of his bounty, they may be given in evidence for the purpose of showing his relations to the people around him and to the persons named in his will as beneficiaries; they are, however, entitled to no weight in proving external acts either of fraud or undue influence."

The same principle is recognized in *Sanford et al. v. Ellithorp*

et al., 95 N. Y. 54; also, in the Matter of Clark, 40 Hun, 238. In *Stevens v. Vancleave*, 4 Wash. C.C. R. 262, where the same question was under consideration, WASHINGTON, J., says: "The declarations of a party to a deed or will, whether prior or subsequent to the execution, are nothing more than hearsay evidence, and nothing could be more dangerous than the admission of it either to control the construction of the instrument or to support or destroy its validity." The same rule is recognized in Connecticut (*Comstock v. Hadlyme Society*, 8 Conn. 254) and in Pennsylvania (*Moritz v. Brough*, 16 Serg. & Rawle, 403), as well as in England (*Provis v. Reed*, 5 Bing. 435).

While none of the authorities have any application to a case of alleged mental incapacity, they have a direct and important bearing upon the case at bar, because, as already stated, the testatrix possessed undoubted testamentary capacity at the time of the making of the will, and the only question involved is as to whether or not this will was procured by fraud or deception practiced upon the testatrix as to its contents. It is true that proof of these declarations was received without objection, but that fact does not obviate the necessity of determining their importance and probative force by the well-defined rules of evidence.

But if it were permissible to treat these declarations as entirely competent evidence upon the question at issue, the inference of deception, or of ignorance of the contents of the will on the part of the testatrix, which might otherwise spring therefrom, is entirely overcome by the proof of the facts and circumstances attending the execution of the will. An attorney of well-known integrity and extensive experience was sent for by the testatrix to draw the will; he went to her residence and to her room and was alone with her in consultation for some considerable time. The will was prepared and the other attesting witness called in; the testatrix seated herself at the table where the will was and signed it, at the same time saying that the bunch on her nose interfered with her seeing the line, and as

testified by the attorney, "After she signed it, she said, 'There! I have got my will made and I want you, Bill (Gilmore, the attesting witness), and you, Mr. Laning to sign it as witnesses.' then I said to her, 'Mrs. Metcalf, you declare this to be your last will and testament, hereby revoking all former wills by you made, and request myself and Mr. Gilmore to sign it as witnesses?' she said, 'Yes;' after that I signed it as a witness and Mr. Gilmore signed it as a witness."

There is no direct proof that the will was read to testatrix after it was drawn; but where a testator is able to read writing and is of sufficient capacity to transact business it may be inferred from the circumstances that the testator was acquainted with its contents. *Nexsen v. Nexsen*, 3 Abb. Ct. App. Dec. 360; *Matter of Smith*, 95 N. Y. 516.

No opportunity was offered to any one to deceive the testatrix as to the contents of the will except Mr. Laning, and it would be an unwarranted inference that he, having no interest in the transaction aside from conscientiously performing his duty as scrivener, exercised any deception in procuring the execution of the will.

A decree will be entered admitting the will to probate and dismissing the objections filed by the contestant.

Ordered accordingly.

In the Matter of the Will of MARY A. BUCHAN, Deceased.

(*Surrogate's Court, New York County, Filed February, 1896.*)

1. WILL.

It is not necessary that a will should contain a clause declaring that it is a will.

2. SAME—WHAT CONSTITUTES.

A paper directing the payment of funeral expenses and legacies, appointing an executor and attested by two witnesses, is a will.

3. TESTAMENTARY CAPACITY.

A mere misstatement of the executor's Christian name is not sufficient to show testamentary incapacity.

4. SAME—INSANITY.

The fact that testator had irrational moments is insufficient to show incapacity, where he was of sound mind when he executed the will.

Probate of will.

James Flynn (R. S. Ransom, of counsel), for proponent;
Adams & Hyde, for contestant; R. L. Wensley, for special guardian.

FITZGERALD, S.—The paper propounded as the will of the decedent is written on two sides of a half sheet of note paper. Line for line it is as follows:

To whom it may concern:

After my funeral expenses & are all paid I request & that Mr. Henry R. Drew shall have charge of my estate and also as I am guardian of my sister's estate. Who is of unsound mind, who is to administer the same as my best interest will permit, that one year after my death the \$4,000. mortgage shall be paid off, and that two years after my death two thousand dollars shall be paid to each of following

friends as follows, viz., To Hettie Whaites, to Lu Thomas and to M. J. Thomas son of Mrs. Henrietta and also to Florence Renville daughter of the Willis J. Renville One thousand dollars. to be delivered without presidence, and also that treat her kindest shall board and support her at her own desire.....

October 6th, 1893.

Witness.. Mary A. Buchan.

Florence M Renville, Orange

Henrietta Thomas No. 10 W. 119 St.

It appears from the evidence that the paper was misdated. It was executed on November 6th, and not on October 6th. It was presented for probate by Mr. Drew, the party named therein to administer the estate.

The decedent, Mary A. Buchan, was a single woman of middle age. She died possessed of several houses and lots in this city and real estate elsewhere, and some personal property. Her next of kin are a brother and sister, the latter conceded to be of unsound mind. The brother and the special guardian of the sister contest the validity of the instrument, alleging that it was not executed according to law, and that at the time of its execution she lacked testamentary capacity. The instrument was written in a legible hand the day before her death by the testatrix herself. The words at the beginning, "To whom it may concern," are not infrequently employed by laymen who assume to act as their own scriveners. It does not contain a declaratory clause that it is a will, nor is such a clause, though usual, necessary. Under the statute the validity of the execution of the instrument depends on such a declaration in words or in substance at the time of execution, but the nature of the instrument itself must be determined by its contents. *Carle v. Underhill*, 3 Bradf. 101. As is common in testamentary instruments, the paper provides for the payment of her funeral expenses. It names Mr. Drew (who had been her agent and is a person of large business experience) to administer the estate; recites the fact that she is the guardian of her incompetent sister, and directs the payment of a mortgage and of four specific legacies to certain friends named. It was attested by the signatures of two witnesses. It is a written statement of her wishes in respect to the disposition of her estate after her death, signed and witnessed—in brief, her will. This fact is made certain by the direction on the envelope in which she inclosed the paper to Mr. Drew, that it was to be opened after her death.

The facts which suggest testamentary incapacity are that Miss Buchan had for some time been suffering with Bright's

disease of the kidneys, from which disease she died the day after she signed the paper; that some of the words are incomplete; that there are lapses in some of the sentences and a manifest deterioration in composition when compared with a postal card written a few weeks previously, doubtless caused by the malady that was soon to cause her death; and that she misstated the Christian name of Mr. Drew, it being Hosea instead of Henry, which is explained by the fact that Mr. Drew signs his name "H. R. Drew," and it is not unusual for parties to address letters to him as Henry, supposing that to be his name. It is in evidence, also, that at times during her protracted illness she used childish and irrational language, and, further, that she asked Miss Renville to shoot her, and once she threatened to throw herself from the window. Had the paper been written and executed at a time when she was uttering these meaningless expressions or doing these irrational acts, it would be a just conclusion that her mind was too much impaired to execute a valid will. But it was not. At the time of executing it she asked for pen and paper, and when they were furnished she, while sitting in bed, without any prompting, wrote the instrument, asked the day of the month, signed the paper and not only requested Miss Renville and Mrs. Thomas to sign it, but to add their residences. The incongruities in the composition of the paper do not affect its dispositive provisions in favor of the four special legatees, the benefiting of whom was the principal purpose of the instrument, for the great bulk of the estate constituting the residue will pass to the brother and sister under the Statutes of Descent and Distribution. Though Miss Renville gave it as her opinion that Miss Buchan was not of sound mind, Mrs. Thomas was equally confident that she was. The opinion of Dr. Eastgate, her attending physician in the country during the summer and until after the month of September, was against her testamentary capacity; that of Dr. Pierson, of Orange, who visited her in this city on the 29d and 30th of October, in response to a request from Miss Buchan written

the 22d, was that her mind was clear. The varying opinions even of the physicians are of slight, if any, importance in the light of the facts occurring at the time of the execution of the paper, for it is evident that Miss Buchan's mind intelligently accompanied that act. The allegation that she was not of sound mind must be dismissed.

The remaining question to be considered is the validity of execution. The only testimony in respect to what occurred at the time is that of the subscribing witnesses, Miss Renville and Mrs. Thomas, each a cousin of Miss Buchan. Mrs. Thomas is the mother of three of the legatees, to each of whom is given a bequest of \$2,000, while to Miss Renville is given \$1,000. On a very important point the subscribing witnesses do not agree. Mrs. Thomas testifies that Miss Buchan, after signing the paper in their presence, said: "This is my will. I would like you, Harriet and Florence, to come here and witness it." Miss Renville states that she did not see Miss Buchan sign it, nor did Miss Buchan show her signature to Mrs. Thomas, though Mrs. Thomas said she saw it when it was signed, and that Miss Buchan asked her (Miss Renville) to sign her name to the paper, but not as a witness; that Mrs. Thomas said: "Sissy (meaning Miss Buchan) wants you to sign this paper;" and that Miss Buchan spoke of it as a "business letter." If Mrs. Thomas is to be believed, there was an express declaration that the paper was her will; whereas, Miss Renville says that the words "business letter," and not "will," were used. Which witness should be credited?

In considering the question the motive for misrepresentation should be examined. Mrs. Thomas, as the mother of three of the legatees, is interested in sustaining the will. This is also manifest by her earnest manner in giving testimony, as shown by the record. Miss Renville, though named as a legatee, is barred from receiving the bequest, because she is a subscribing witness. It is apparent from the objections filed and from the evidence that between Mrs. Thomas and the brother, and those

in sympathy with him, there is not a cordial feeling; and it is quite apparent on the proofs that there is friendship between them and Miss Renville. She, though living in New Jersey, within an hour's ride of the city, declined to appear in open court for examination, and her testimony was taken under a commission on application of the special guardian, who contests the will. In an examination on a commission counsel representing an adverse interest are generally at a disadvantage, as they have not the same opportunity of changing or discrediting statements of the witness which an examination before the court would afford them.

While the principles that should govern my decision in respect to the credibility of the witnesses are clear, their application is not so easy, because of the peculiar facts which have been disclosed by the evidence, and I prefer to give it a careful examination in the light of the able briefs which have been presented by the respective counsel.

The statute in reference to wills was enacted to effectuate, not to defeat, the wishes of competent testators who act without constraint in respect to the disposition of their estate. The formalities of execution prescribed are to make it certain that fraud, deception or coercion are not practiced. When the circumstances show that there is a testamentary purpose, the courts favor such an interpretation of the evidence that there may not be a miscarriage of justice. The doctrine is concisely stated by DENIO, J., in *Hoysradt v. Kingman*, 22 N. Y. 372, thus:

"The general right to dispose of one's property by act in writing to take effect at his death is established by our statute respecting wills, and has always been the law of this State. The restrictions which, from motives of prudence, are thrown around that right should be construed liberally in favor of the testament, and forms should not be required which the Legislature has not plainly prescribed."

In *Jackson v. Christman*, 4 Wend. 277, it was held that "if the subscribing witnesses all swear that the will has not been

duly executed, the devisee may, notwithstanding, go into circumstantial evidence to prove its execution."

In *Peebles v. Case*, 2 Bradf. 226, it is laid down that "even when the subscribing witnesses corruptly deny the execution and, *a fortiori*, where they are mistaken, the proof of the will may be supplied from other sources. It is an error to suppose that the law has invested the subscribing witnesses with absolute power to defeat the ends of justice; it would be a most dangerous doctrine to hold that the validity of so important an instrument depends entirely on the honesty of two witnesses, and that if they deny its execution the will inevitably falls. Such may often be the consequence in the absence of any other proof, but it is not a necessary consequence in law; such tremendous power is placed in no man. The proof of a will abides by the same rules of evidence as prevails in all other judicial investigations. The question for the court is the *factum* of the instrument, and that may be proved in the very teeth of the subscribing witnesses." See, also, *Matter of Cottrell*, 95 N. Y. 329.

In *Robinson v. Smith*, 13 Abb. Pr. 359, there was a conflict in the testimony of the subscribing witnesses on the question of execution. The learned surrogate gave credit to that of the scrivener against that of the subscribing witnesses, who denied that there had been a valid execution of the will. On the whole of the evidence and the facts and circumstances disclosed he was satisfied that the testator had signed the paper, that his name was visibly to it, and that the testator and the subscribing witnesses understood that it was a testamentary instrument. The opinion was so able and exhaustive that the General Term did not discuss the case at length.

In *Lewis v. Lewis*, 11 N. Y. 220, it was held that the publication of a will may be inferred from the circumstances, as well as established by the direct and positive evidence of the witnesses.

In *Lane v. Lane*, 95 N. Y. 494, the court held that from the situation of the parties and the circumstances surrounding them

the jury were justified in saying that the testator made the required declaration to the witnesses.

In *Matter of Beckett*, 103 N. Y. 167, was the case of an inferential publication. The paper was brief and was inartistically drawn by the testatrix. At the time of its execution she did not declare it to be a will, but spoke of it as a "paper." On a previous occasion she had told the two witnesses that, at a future time, she would want them to witness her will. On a subsequent day she produced a paper and stated to each that it was the one she had already spoken of and she asked them to sign it. The court held that the previous characterization of the paper as a will applied to it and identified it when it was produced for execution.

In a recent case, *Matter of Hardenburgh*, 85 Hun, 580, it is held that the failure of one witness to a codicil to remember what was said in regard to the same as fully as the other, who drew up the paper, did not disprove the facts testified thereto by such other witness; that the fact that the testator was fully apprised of the character of the instrument sought to be probated might be considered in aid of the proofs tending to establish publication; that any act of the testator in the presence of the witnesses at the time of the execution which tended to show that he desired to publish the same as a testamentary instrument, and that he wished the witnesses to execute it, might be considered; and although the testator did not, in words, declare it to be his last will, if he treated it as such and intended the witnesses to understand it to be such, it was equivalent to such a declaration, and was sufficient to satisfy the requirements of the statute upon the subject, though the statute did not necessarily contemplate such a declaration in words in order to render the instrument valid as a will.

In *Matter of Hunt*, 42 Hun, 434, a holographic will, the language is: "It seemed very certain that the signature of the testator was in full view of the witnesses, and that the fair inference was that he signed it in presence of the witnesses;

that if the will was signed before its attestation by the witnesses, the exhibition of the will and of the testator's signature attached thereto, and his declaration to the witnesses that it was his last will and testament, and his request to the witnesses to attest the same, were a sufficient acknowledgment of the signature and publication of the will." The decision was affirmed. 110 N. Y. 278.

The trend of the decisions in the English courts is also in the direction of a liberal construction of the law in respect to the execution of wills. Section 8 of the Act of 1 Victoria is in words almost like our own.

In *Hott v. Genge*, 3 Curteis, 160, a holographic will, the question was the acknowledgment by the testator of his signature to the will at the time of its execution. In the decision this language is used: "It is not necessary that the testator should state to the witnesses that it is his signature. The production of a will by the testator, it having the name upon it, would be a sufficient acknowledgment of his signature under the present statute."

In *Gaze v. Gaze*, 3 Curteis, 451, the note is: "A testator produced a will all in his own handwriting, and having his name signed at the end thereof, to three persons, and requested them to put their names underneath his. Held, a sufficient acknowledgment of the signature, the court being satisfied (though there was no express evidence of the fact) that the signature was of the handwriting of the testator." The learned judge adds: "I think it would be a hypercriticism to say that there has not been a sufficient compliance with the words of the Act in this respect."

Blake v. Knight, 3 Curteis, 547, was also the case of a holographic will, and in the opinion it is held that "the court is not bound to have the positive affirmative evidence of the subscribing witnesses. I am quite satisfied that the name of the testator was signed to the paper before the witnesses subscribed, and I think that his acknowledging this to be his will, it being

all in his own handwriting and his name, as I hold, being then signed to it, amounts to a sufficient acknowledgment of his signature."

It is always embarrassing to determine where the truth lies when the statements of witnesses are at variance on an important point. Those of Miss Renville and Mrs. Thomas—both reputable women—can only be reconciled on the theory that Miss Renville (whose hearing is confessedly somewhat impaired) did not understand correctly what Miss Buchan said, that her memory was at fault, or that either she or Mrs. Thomas has been guilty of perjury—which last suggestion I cannot favor. It is well settled that an improper motive should not be imputed when witnesses give different versions of an event if the difference can be explained by defective memory or personal infirmity, and each witness is to be credited with a desire to tell the truth. It may be that, during the transaction, in the presence of Miss Renville, Miss Buchan did use the word "business," coupled with the word "letter," in speaking of the paper; for she did enclose the will in an envelope and addressed it to Mr. Drew. For her to have declared the paper to be a "business letter" would be inconsistent with all the circumstances surrounding the transaction. The paper was a will, and nothing else. It was written for a will with the evident consciousness that she was nearing death. Miss Renville states that Miss Buchan signed it in presence of the witnesses and not only asked them to attest it, but requested that they also write their addresses. She put the paper in an envelope which she herself sealed and addressed to the person whom she had named to carry out its provisions, with a direction in writing that it be opened after her death. Would she have done all these things in respect to a mere business letter? Miss Renville must have understood from what had occurred and from the surrounding circumstances that the paper was a will. The statement of the transaction given by Mrs. Thomas is in harmony

with everything that occurred; that of Miss Renville is inconsistent with the probabilities.

I am mindful that Mrs. Buchan, the wife of the contestant, Mrs. Morgan, her mother, and Mr. Adams, one of the contestant's attorneys of record, have testified that subsequently Mrs. Thomas, in referring to the matter, said that the paper she signed was stated to be a "business letter," and because of this it is sought to discredit her testimony. If Mrs. Thomas made such statement it was an erroneous one. It is inconsistent with her testimony, which I believe to be trustworthy as to the declarations of Miss Buchan in respect to the character of the paper, and with the probabilities of the case in view of the nature of the instrument itself and the circumstances attending its execution.

Probate decreed.

In the Matter of the Probate of the Will of JOHN R. ELY,
Deceased.

(*Surrogate's Court, Kings County, Filed March, 1896.*)

1. TESTAMENTARY CAPACITY—INSANITY.

Where it is shown that general insanity existed as an habitual condition of mind, the proofs must show clearly that at the time the will was executed there was an absence of the disease itself, and not merely of its apparent delusions.

2. SAME.

Evidence sufficient to show incompetency because of alcoholic insanity.

Probate of will and codicils.

Ernest H. Jackson, George G. Reynolds, Henry C. M. Ingraham and George S. Ingraham, for proponents; Charles H. Otis and Wingate, Cullen & Miller, for contestants; John B. Lord, special guardian.

ABBOTT, S.—John R. Ely died on the 1st day of September, 1895. He left him surviving his widow, Phebe M. Ely, and two sons, Henry D. Ely and George C. Ely. Three papers, purporting to be his last will and testament and two codicils, have been propounded for probate. The will bears date April 17, 1889; the first codicil, December 29, 1890; the second codicil, May 17, 1892. Objections to the probate of these instruments were filed by the widow and by the People's Trust Company, as committee of the estate of George C. Ely, a lunatic, specifying the usual grounds. The objections filed by the widow also allege undue influence; but no evidence was offered tending to prove this allegation. I will first review the general features of the life of the testator in their chronological order, and the development of his habits both of mind and body.

In his youth and early manhood his habits were exemplary; his temperament joyous and even boisterous. He was not addicted to the use of intoxicating stimulants, nor was the tone of his conversation either profane or vulgar. At this early period some of his acts, as detailed by the witnesses of the proponent, were at least eccentric in their excess of roughness.

In the year 1884, when he was about twenty-five years old, his habits had undergone a complete change. He had then commenced the excessive use of alcoholic stimulants, was frequently intoxicated, and his language was at times profane and vulgar.

He was twice married. His first wife bore him two children, Henry D. Ely and George C. Ely, who survived him.

His second wife also bore him two children, one of whom lived to be ten years and six months old, and died about 1882. The other died in infancy.

His habits of intemperance increased as time advanced, until in the years from 1878 to 1882 scarcely a day passed in which he was not grossly intoxicated.

In March, 1882, his condition was such that it became necessary to send him to an institution for the insane, the "Long Island Home," at Amityville, Long Island, and at about the

same time a committee of his estate was appointed after due proceedings by order of the County Court of Suffolk county. While an inmate of the "Long Island Home" he was extremely violent and was placed under restraint. At this time he was unquestionably insane. This is conceded by counsel for the proponent, and testified to by their witnesses. The suggestion was made by counsel for proponent, in summing up, that Ely was, at this time, suffering from delirium tremens. I have been unable to find any testimony in support of this suggestion. On the contrary, the evidence all tends to prove that he was suffering from alcoholic insanity, to which he was rendered peculiarly susceptible by reason of an hereditary tendency to insanity.

He remained an inmate of the Long Island Home for about three months, and was then taken to his home at Bayport by his wife, although not discharged as cured.

He was especially liable to insanity as a result of his grossly excessive use of alcoholic stimulants, by reason of a tendency in that direction inherited from his mother. It is not disputed that his mother was insane for many years; that his brother now is, and has been since 1884, an inmate of an institution for the insane; that his sister has been an inmate of such an institution; and that his son, George C. Ely, is now insane and under the control of a committee of his person and estate. And that John R. Ely himself was judicially declared to be insane in the years 1882 and 1893.

The evidence, therefore, is practically undisputed that in the year 1882 John R. Ely was suffering from alcoholic insanity. From this time on to the time of the appointment of his second committee in September, 1893, he continued his excessive use of liquor, so that for periods of weeks at a time he drank and shouted throughout entire days and nights. Perhaps the strongest testimony as to the extraordinary quantities of whiskey which he drank is that of one of the proponent's witnesses. The statement upon this subject made by the witness, Elijah Lee St.

John, would seem almost incredible, except that it is supported in a general way by the testimony of nearly all of the witnesses on both sides.

On February 7, 1885, he made an attack upon Miss Catharine E. Lott, his wife's sister, struck her on the head with a pitcher, and knocked her down, when his wife and George C. Ely came to her rescue.

On Christmas day, 1885, he had a stroke of paralysis. He had another in the summer or early fall of 1888.

In February, 1886, he was attended professionally by Dr. Clinton A. Belden, of Jamaica, Long Island, who testifies: "Q. On the occasion of your first call on February 11, 1886, what was the matter with Mr. Ely? What did you attend him for? A. I called to see him for insanity; he was insane. Q. Occasioned by what? A. The excessive use of whiskey."

At this time Mr. Ely declared his intention to Dr. Belden of floating a farm and buildings from Connecticut to Long Island so as to have it handy.

Dr. Belden testifies that in 1886 Ely was of unsound mind and incapable of the management of his affairs.

He was attended professionally by Dr. Samuel Hendrickson, of Jamaica, Long Island, from August 2, 1888, to October 8, 1888.

Dr. Hendrickson testifies that he attended Ely for chronic alcoholism; that he was of unsound mind and incapable of transacting business.

From June, 1893, down to the time of his decease Dr. Essig attended him.

Dr. Essig testifies that Mr. Ely was insane when he commenced his professional treatment in June, 1893, and was at that time suffering from chronic paralytic insanity.

Dr. Carlos F. MacDonald was called by the contestants, both as an expert upon mental diseases, and as to the facts of a personal examination which he made of Mr. Ely in October, 1893. He testifies that at the time of his examination of Mr. Ely his

conclusion was that Mr. Ely was suffering from chronic insanity complicated with paralysis, and that such insanity was of long standing. Aided by the facts assumed in the hypothetical question, Dr. MacDonald states unqualifiedly that Mr. Ely was, and for several years had been, suffering from chronic alcoholic insanity, which became subsequently complicated with paralysis; that in Mr. Ely's case a double cause for his insanity existed. The predisposing cause being an hereditary tendency, and the exciting cause the excessive use of alcohol; that if alcoholic insanity ever exists, and the excessive use of alcoholic stimulants be thereafter continued, this would tend to aggravate the condition and to progress it downward. That chronic alcoholic insanity is not usually regarded as a recoverable form of disease, and that he did not know and had never read of a case of recovery where the excessive use of alcohol had been continued after the insane condition had been established. The proponents introduced no medical testimony whatever in rebuttal.

I shall not undertake to review at length the testimony of the lay witnesses called in behalf of the contestants. It certainly fully bears out the testimony of the physicians who attended Mr. Ely, and proves beyond question the existence of a variety of delusions from the year 1879 down to the time of his death, in September, 1895, such as opening his distillery on Sunday, and complaining that the workmen were not at their occupation; imagining that he heard voices in the hall, there being no persons in the hall; that his son George was dying in a barrel in the yard; that his brother-in-law was dead, and that he saw him hanging upon a tree near the house; facetiously biting off and eating the head of a mouse; imagining that he was being pursued by the military and United States revenue officers. We find him constantly carrying on conversations with imaginary persons, particularly with his deceased son, whom he called "Dad;" using profane and indecent language at all hours of the night and day, to a degree which is scarcely con-

ceivable, and as well at times when no one else was in the room as when other persons were present, always in a loud tone of voice, except when he was too ill to make a noise; forcing his wife with threats and profanity to remove her clothing in order that he might send it to his sister; repeatedly making attacks upon his wife, striking her, choking her, and once, in 1881, when she was ill in bed, threatened with pneumonia, seizing her by the hair, making use of the vilest and most disgusting epithets toward her; accusing her of infidelity; imagining that she had men concealed in the house; exposing his person in the presence of women; locking cats and dogs in his wife's sleeping-room; screaming and shaking his fists in the air; attacking his man servant and threatening to take his life; breaking panels in the doors of his house; concealing, on one occasion, a carving knife on his person; on another, a hatchet in his bed; going to the office of the hotel where he boarded clad only in his night-shirt; giving away large sums of money to servants; striking an old friend in the neck, who had called upon him at his request; striking a stuffed eagle in the parlor of a friend's house; sparring at his own reflection in the mirror; imagining that particular individuals were passing the house, no persons being in sight, and manifesting other like delusions.

No suggestion has been made of any reason for his animosity toward his wife, or that the slightest foundation existed for his accusations against her.

On the contrary, the witnesses on both sides agree, and the evidence clearly proves, that her entire life with him, after about the year 1879, was one of constant and uncomplaining self-sacrifice and devotion to the care of her husband, and that he depended on her almost entirely in every relation of life.

His letters to his wife, received at various times from 1881 to 1888, constitute the most remarkable specimens of incoherency, profanity and vulgarity which have ever fallen under

my notice. It were charity, indeed, to believe that a man capable of writing such letters was insane.

On repeated occasions even within a few months previous to his signing the will, he declared his intention never to make a will, because people who made wills died; that it would not be worth a damn if he did; and that his property should be divided into three piles.

A large number of the lay witnesses, called by the contestants, had known Mr. Ely intimately for many years, and had seen him frequently; and none of these, with the exception of two or three, were in any way related to Mrs. Ely, nor had they any interest whatever in the contest. After detailing the conversations and actions of Mr. Ely, they were all of the opinion that such conversations and actions were irrational.

I will now take up the will itself.

The first clause directs the payment of debts, funeral and testamentary expenses.

The second clause provides as follows: "Second. Having heretofore given to my wife, Phebe M. Ely, a certain farm and premises at Bayport, in the town of Islip, Long Island, and a farm known as the James Lott farm, at Jamaica, Long Island, I give to my said wife all my right, title and interest in and to the shore front and strand and all other lands adjoining said premises at Bayport aforesaid, and the water rights appurtenant thereto, and I give to my said wife all the farming utensils, horses, wagons, live stock of all kinds, furniture and personal property of whatever character (except books and private papers), belonging to me on either of said places at Bayport and Jamaica aforesaid at the time of my decease. I give to my said wife also two bonds of one thousand dollars each of the South Brooklyn Central Railroad Company now in her possession, and ten shares of the capital stock of the Long Island Railroad Company, the certificate of which stands in her name."

As a matter of fact, Mr. Ely's farm at Bayport had already been sold and conveyed by him, together with all of the farming

utensils appertaining thereto, in the spring of 1886, three years before the will was signed by him. The farm had never been given by him to Mrs. Ely. From the sale of the farming utensils in 1886 there had been reserved "some little things he took a fancy to; I think there was a little harrow; he reserved that for his garden; and I think a little plough." This was the extent of the farming utensils appertaining to the Bayport farm. Mrs. Ely had a house at Bayport, originally built upon an acre of ground given to her by Mr. Ely's brother, Henry. Mrs. Ely then bought the adjoining acre, and may have received the money with which to pay for it from her husband.

Some of the witnesses testified that it was the usual custom among the people at Bayport to refer to Mrs. Ely's property as "the little farm," as contradistinguished from "Mr. Ely's big farm;" but these witnesses almost invariably, in referring to Mrs. Ely's property in the course of their testimony, referred to it either as "Mrs. Ely's place" or "the little place." At all events a two-acre place would hardly be designated in a solemn and formal instrument like a will as "a farm."

As to the "James Lott farm," so-called, Mrs. Ely acquired it in part by inheritance from her father's estate, and in part by purchase from her devisees under her father's will.

The bonds and stock referred to in the same clause of the will were already in the possession of Mrs. Ely and were her property.

The "third" clause contains the only real provision in the will for his wife. It gives to the Long Island Loan & Trust Company 230 shares of the capital stock of the New York Central & Hudson River Railroad Company, in trust to receive the dividends and income thereof and pay the same to Mrs. Ely during her life, and upon her decease to pay them to his sons Henry and George, one-half to each, during their respective lives, with remainder to their respective issue, or in default of issue, to the survivor. The value of this stock in the year 1889 was shown to be \$28,750.

This gift for Mrs. Ely's benefit was in lieu of dower.

Then follow in the "fourth" and "fifth" clauses general legacies to various persons, varying in amounts from \$100 to \$1,000 each, amounting in the aggregate to \$3,000.

By the "sixth" clause he gives to Elijah Lee St. John \$5,000 in trust for St. John's children. Elijah Lee St. John was a first cousin of Mr. Ely.

"Seventh. I give to the Congregational Church of Simsbury, Connecticut, the sum of one thousand dollars in trust, to be invested and so much of the income thereof as may be necessary to be applied to keep in order the burial plot in the burying-ground adjacent to said church, in which my parents and grandparents are interred; the residue of said income, if any, to be applied to the use of said church."

It is to be noted as a curious circumstance that Mr. Ely makes no provision for the care of the burial plot in which his own remains and those of his first wife are interred; nor for the care of that in which the remains of his two deceased children by his second wife are laid.

By the "ninth" clause he gives to the Long Island Loan & Trust Company 600 shares of the capital stock of the Chicago, Rock Island & Pacific Railroad Company, in trust for the benefit of the children of his sister, Mrs. Adams, during their respective lives, remainder to their issue. The value of this stock in 1889 was about \$54,000.

By the "tenth" clause he gives to his son George C. Ely a savings bank account in Connecticut and ten shares of the capital stock of the Long Island Railroad Company, standing in his name.

By the "eleventh" clause he gives to the Long Island Loan & Trust Company 250 shares of the capital stock of the New York Central & Hudson River Railroad Company, in trust to pay the dividends to his son George during his life, remainder to his issue, if any, and, in default of issue, to Henry D. Ely, if living, or if not living, to his issue.

The "twelfth" clause disposes of the residuary estate. This is given to the Long Island Loan & Trust Company, in trust to invest and pay the income to Henry D. Ely until he becomes thirty-eight years of age, with remainder over in the event of his decease before that time. Upon Henry's arriving at the age of thirty-eight years, to divide the residuary estate into two equal shares and pay the income of one share to each of his sons, Henry and George, during their respective lives, with remainder over to their issue, if any, or to the survivor if no issue.

The total personal estate of the testator amounts to about \$300,000.

Henry D. Ely was thirty-two years of age and George C. Ely was twenty-nine years of age at the time of thier father's decease.

The provisions of this will strike me as at least unusual and eccentric. The gift to his nephews, the children of Mrs. Adams, and their issue, amounts to at least three times as much as the benefits derived under the will by Mrs. Ely, his faithful and devoted wife.

No reason appears in the testimony for the discrimination in favor of his son Henry, as against George, during an arbitrary period. It does not appear that George received any benefit from his father during his life, while it does appear that Henry did receive such benefits to the amount of about \$20,000.

Until Henry arrives at the age of thirty-eight the benefits derived from Mr. Ely's bounty by the children of his sister, Mrs. Adams, amount to nearly twice as much as those which his son George would enjoy.

I will now review the facts attending the execution of this document, and the testimony of the subscribing and other witnesses to its execution.

The witnesses to the will were Edward White, an insurance broker, and John G. Jenkins, president of the First National Bank of Brooklyn.

The will was executed in triplicate.

Edward White testifies that he knew Mr. Ely for about eight or ten years, and effected his insurance for him; saw him once or twice a year; recognizes his signature to the will and remembers the occasion of his witnessing it; states that Mr. Ely, Mr. Jenkins, Mr. Coombs and Mrs. Ely were present; did not see Mr. Ely sign the will; Mr. Ely simply wanted Mr. White to acknowledge his signature; Mr. Ely said it was his will, and Mr. Jenkins signed first and then Mr. White signed; Mr. Ely asked witness if he would not witness his will; what the transaction was afterward witness does not know; he was not there; he left.

“Q. What do you say as to his mental condition, and the soundness of his mind, and his capacity to make a will, from what you observed there? A. I thought he was pretty sound that morning; I never found him in any other way. Q. You never did find him in any other way? A. No. Q. In your opinion he was of sound mind that morning when he made the will? A. I think he was. Q. He knew what he was about, in your opinion? A. Yes, sir.

The witness heard no conversation that morning between Mr. Coombs and Mr. Ely.

The testimony of Mr. Coombs may be now conveniently considered.

Mr. Coombs, an attorney at law, attended upon the execution of the will. He had never seen Mr. Ely prior to that occasion. He went in company with Mr. Jenkins to the Wall House, where Mr. Ely was boarding. He subsequently went for Mr. White, as he remembers, at the suggestion of Mr. Ely, to request him to become a witness to the will. He testifies that Mr. Ely was garrulous, profane, vulgar and obscene; that Ely signed in the presence of the witnesses and that he, Mr. Coombs, asked all the formal questions pertaining to the execution of the will. In this respect his recollection differs from that of the witness White, who does not recollect that Mr. Coombs said anything while he was present, but thinks that Mr. Ely did all the talk-

ing. Mr. Coombs also thinks that Mrs. Ely was present. (Upon this point both witnesses are clearly in error. The evidence that she was in Bayport at this time is most convincing.) Mr. Coombs testifies that in his opinion the acts and conversation of Mr. Ely were rational. It does not appear that the wills were read to the testator; and he was not asked if he had read them. They were in his possession when Mr. Coombs called.

John G. Jenkins, the other subscribing witness, testifies that he had no distinct recollection of the time or place of the execution of the will. He does remember, however, the fact of its execution and of his signing as a witness. Mr. Jenkins had known Mr. Ely intimately from boyhood, and since 1886 had charge of his property and investments, in connection with Mrs. Ely. Since that time he had directed all of his business transactions and dictated his investments with but two exceptions, both of which resulted unfortunately. Mr. Jenkins was in the habit of seeing Mr. Ely personally at this period about four times a year. He states with great positiveness that at that time Mr. Ely was, in his opinion, insane. He says, "During that month I would not let him get behind me." "Q. What do you mean by that? A. I don't think my life would be safe unless I had my eyes on him at any time for the last fifteen years."

This evidence of the subscribing witnesses is unsatisfactory, and leaves the question of Mr. Ely's testamentary capacity open to serious doubt. Mr. Jenkins, the only witness to the execution of this will who had any intimate acquaintance with Mr. Ely, expresses in the strongest possible terms his conviction that he was insane at that time.

The acts and conversations testified to by Mr. Coombs and which he characterizes as rational were at least eccentric, and such as would hardly be looked for on such an occasion.

The first codicil bears date December 29, 1890. By this codicil the testator revokes the appointment of Jeffrey O. Phelps as executor; directs that his executor be required to give bonds

in the sum of \$5,000 each, and directs that his will and codicil be probated in Simsbury, Connecticut.

The proponents did not offer any evidence whatsoever in support of this codicil.

The subscribing witnesses were John G. Jenkins and W. A. Fields.

Mr. Jenkins' opinion as to the mental condition of Mr. Ely at this time has already been sufficiently indicated.

The contestants called the other subscribing witness, Mr. Field, in their own behalf.

Mr. Field testifies that he is cashier of the First National Bank of Brooklyn; that upon the occasion of his witnessing this first codicil "his manner was peculiar;" "did not like the manner in which he spoke of things in general." "He talked in rather an erratic manner." "His conversations were erratic." "His manner was what you might call boisterous." "He talked loud and used a few profane words." "He was speaking in a reminiscent sort of manner." "Spoke of different people." "Different things past."

Mr. Field's opinion was that "Mr. Ely was not of sound mind; his manner of speech and talk, etc., were such as to make me think he was of unsound mind." "He talked in a wild and erratic manner." "He talked in a low tone; then in a very loud tone." "Jerked his words out." "Occasionally used profane words."

The impression which the conversations, manner and tones of voice made upon this witness was such that he "wished he had not come into the house."

It thus appears that the first codicil certainly could not have been admitted to probate upon the testimony of the subscribing witnesses alone.

The second codicil is dated May 17, 1892. It revokes the appointment of Jeffrey O. Phelps as executor, and appoints John G. Jenkins as executor in his place.

The subscribing witnesses to this codicil were Frank Jenkins and William S. Irish. The testimony of those witnesses is substantially the same, except as to the conclusions which they reached concerning the testator's sanity. The witness Frank Jenkins is a broker and a son of John G. Jenkins. To summarize the testimony of the witnesses of the second codicil, Mr. Jenkins and Mr. Irish called at Mr. Ely's room at about 8:15 a. m., and remained about fifteen minutes. Mr. Jenkins brought the codicil with him. It was not read to or by Mr. Ely, and he had no conversation whatever with either of the witnesses during their entire stay, except to answer affirmatively Mr. Jenkins' formal questions on the execution of the codicil. Mrs. Ely was absent from the room nearly all of the time. In her absence, Mr. Ely was walking up and down the room, apparently mad or angry, and was mumbling to himself and swearing. Neither of the witnesses had any personal acquaintance with Mr. Ely and had never previously exchanged a word with him, but had seen him before. Mr. Jenkins had seen him twice; once seventeen or eighteen years previously, and once two or three years previously. On the latter occasion he perceived a very marked change in Mr. Ely, and at that time he was swearing in the office of his attorney in a voice so loud that "you could hear him all over the building."

When the witnesses went away from the house Mr. Jenkins took the codicil with him.

Both witnesses were disinclined to express any opinion as to Mr. Ely's mental condition; but Mr. Irish finally says that he was of sound mind so far as he could see. "He answered the questions all right."

The proponents called and examined at great length several witnesses, including the parents of some of the beneficiaries named in the will; farm hands who had at various times been employed by Mr. Ely upon his Bayport farm before he sold it in 1886; one neighbor of Mr. Ely's at Bayport; the attorney for the purchaser of a valuable parcel of real property from

Mr. Ely, purchased and conveyed in the spring of the year 1889, and some others.

I shall not undertake to discuss the testimony of all these witnesses. They described various occasions upon which they had met Mr. Ely, and with more or less detail testified to what occurred on those occasions, and all characterized his actions and the conversations testified to by them as rational. The large majority of these witnesses had seen Mr. Ely very seldom subsequent to the year 1886. Everything to which they testified might well have occurred and still have been perfectly consistent with an insane condition of Mr. Ely.

I should, perhaps, touch upon the testimony of Mr. Maddox, the attorney for Frank Seaman in the purchase of the "distillery property," so called, from Mr. Ely. Mr. Maddox had occasion to call upon Mr. Ely only once in connection with that transaction. He took to him a contract of sale for his signature, prepared by Mr. Maddox in accordance with the terms of an option to purchase which his client, Mr. Seaman, had previously procured from Mr. Ely. Mr. Ely refused to sign it until he had submitted it to his attorney.

"Q. Did you observe anything in the conversation or acts of Mr. Ely at that time which was unusual or out of the way for any business man? A. Nothing, save his boisterous conduct, possibly. Q. In what respect? A. Loud voice; it was difficult to get him to agree with me first."

Mr. Maddox states his opinion that the acts and conversations upon this occasion were "certainly rational." He had previously seen Mr. Ely on occasions when he thought he was intoxicated, and on those occasions he thought that Ely behaved in anything but a rational manner.

Subsequently, in 1893, Mr. Maddox was one of the commissioners appointed by the Supreme Court upon an inquiry as to the sanity of Mr. Ely, in which proceeding Mr. Ely was adjudged to be insane.

On the other hand, Mr. Seaman, Mr. Maddox's client, who purchased the distillery property from Mr. Ely for \$106,000, had frequent interviews with Mr. Ely during his stay at the Wall House from October, 1888, to April, 1889, and had known him intimately for many years, visited at his house often, had been in his employ in the distillery business and had bought out his business some years before the real estate transaction.

Mr. Seaman, after detailing many conversations and acts, including those relating to the real estate transaction in 1889, characterizes them as irrational. He excuses his purchase of the real estate from an insane man by the fact that before he entered upon the negotiations he consulted Mrs. Ely and Mr. D. P. Ely, an uncle of John R. Ely, as to his intention, and secured their approval; and further, upon the ground that he was actually paying Mr. Ely more than the property was worth, according to D. P. Ely's idea of its value.

I regard the testimony of this witness as of especial weight, in view of the circumstances under which it was given.

I cannot pass by without comment the documentary evidence offered by the proponents, consisting of letters, receipts, etc.

It may well be that these letters and documents are entirely rational, or even that they exhibit a high degree of shrewdness and intelligence; and yet these facts are by no means inconsistent with a condition of general insanity of Mr. Ely. Insanity is a positive and affirmative disease, to which extremely intelligent persons are subject, and insane persons may possess a high degree of intelligence and rationality with reference to a great variety of subjects.

I have no doubt that Mr. Ely thought that he had made a will, and that he had practically excluded his wife from any benefits thereunder, and that he had made a discrimination in favor of his son Henry against his son George, and that he had conferred benefits upon his nephews, the children of his sister, Mrs. Adams, very greatly exceeding the benefits which he bestowed upon his wife.

I have equally little doubt that at the time he executed this fantastical will and codicils, he was generally insane and the victim of a variety of delusions. In fact, I am of the opinion that he should have been restrained and kept in an institution for the treatment of insane persons from 1882 down to the time of his death, as I believe that at that time and ever afterward he was irresponsible and suffering from alcoholic dementia.

The rules of law applicable to the conclusion which I have reached upon the facts are well settled.

They are, however, frequently confused with other principles which are applicable to an entirely different state of facts, and on account of this confusion I shall briefly express my view of the law by which the facts of this case must be controlled.

The statute provides: "All persons, except idiots, persons of unsound mind, and infants, may devise their real estate," etc. 2 R. S. 56, sec. 1, as amended by Laws 1867, chap. 782, sec. 3; 3 Birdseye's Statutes, 3342.

"Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will in writing." 2 R. S. 60, sec. 21, as amended by Laws 1867, chap. 782, sec. 4; 3 Birdseye's Statutes, 3342.

The construction which has been given to those or entirely similar provisions by the English courts has been adopted by the courts of this State.

It is unquestionably now the settled law of both England and the State of New York that a monomaniac may make a valid will, provided his monomania has not had and is not capable of having any influence upon his testamentary dispositions.

This conclusion was reached by the courts of England after many years of discussion and after several decisions had been rendered, of which some held such wills to be valid, and others held them to be invalid. 1 Jarman on Wills (5th ed.), p. 78, sec. 38; Brown's Med. Jur. of Insanity, sec. 149, p. 252 *et seq.*,

and cases cited and commented upon. *Seaman's Friend Society v. Hopper*, 33 N. Y. 619, 640.

But it has never been held that a generally insane person, a lunatic, having a variety of delusions, or even a single delusion, which may have some effect upon his testamentary disposition, can make a valid disposition of his property while his mind is so diseased. In a case where general insanity is shown to exist as an habitual condition of mind, the proofs must be extremely clear that, at the time the will was made, there was an absence of the disease itself, and not merely of its apparent delusions. 1 *Jarman on Wills* (5th ed.), p. 78, sec. 38; *Brown's Med. Jur. of Insanity*, *supra*.

The principle here stated has been frequently recognized in the decisions of the courts of this State.

In the leading case of *Delafield v. Parish*, 25 N. Y. 9, DAVIES, J., at page 22 *et seq.*, reviews the earlier decisions of the courts of England and of this State upon the question of the degree of mental capacity requisite for the making of a valid will. The cases considered related almost exclusively to the testamentary capacity of weak, impaired and imbecile minds, as distinguished from the minds of idiots and the affirmatively diseased minds of generally insane persons.

Throughout this discussion Judge DAVIES assumes that generally insane persons, persons who are the victims of delusions, do not possess testamentary capacity. It would certainly seem that such persons would fall within the definition of a "person of unsound mind," without the necessity of such discussion or argument.

Although Judge GOULD dissented from the prevailing opinion upon the question of the testamentary capacity of the testator in that case, nevertheless he concurred entirely with the reasoning of Judge DAVIES upon the question now under consideration, and expressed his views at some length at page 70 *et seq.*

A majority of the court concurred with the reasoning of Judge GOULD upon this subject in the following memorandum at page 97:

"In law, the only standard as to mental capacity in all who are not idiots or lunatics is found in the fact whether the testator was *compos mentis* or *non compos mentis*, as those terms are used in their fixed legal meaning."

An exception is always made of idiots and lunatics. It is assumed that such persons are incompetent.

This principle is recognized and reiterated in *American Seaman's Friend Society v. Hopper*, 33 N. Y. 619. At page 624, DENIO, J., says: "Setting aside cases of dementia, or loss of mind and intellect, the true test of insanity is mental delusions. If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act and speak like a sensible man. *Dew v. Clark*, 3 Add. 79."

Again, at page 630: "In referring to the evidence on the part of the contestants, I have omitted a great deal which is related by them showing the folly, fatuity and incoherence manifested by the deceased upon various occasions and upon different subjects. They afford some ground for imputing to the deceased general insanity. But as he was an habitual drinker, and was frequently intoxicated, it is impossible to say whether what is deposed to was the result of temporary intoxication, or of settled mania. I have, therefore, in coming to a conclusion, relied wholly upon the proof of delusion upon the two subjects intimately connected with the testamentary disposition of his property."

In *Van Wyck v. Brasher*, 81 N. Y. 260, EARL, J., at page 262, says as follows: "A drunkard is not incompetent like an

idiot or one generally insane. He is simply incompetent upon proof that at the time of the act challenged his understanding was clouded or his reason dethroned by actual intoxication. *Peck v. Cary*, 27 N. Y. 9; *Gardner v. Gardner*, 22 Wend. 526. Here there was no proof of general unsoundness of mind or of general insanity, and none whatever that the grantee used any artifice, undue influence or fraud, to procure the conveyance."

My attention has been called by one of the counsel for the proponents to the cases of *Matter of Will of Halbert*, 15 Misc. Rep. 308, and *Matter of Will of Johnson*, 7 id. 220, and I entirely agree with the conclusions reached in those cases.

In the *Halbert* case, there is no suggestion of any condition of general insanity of the testatrix. The only issue was whether or not at the time of the execution of the will she was intoxicated. It was decided by the surrogate as a matter of fact that she was not intoxicated at that time.

So, also, in the *Johnson* case, the only issue was as to the drunkenness of the testator at the time of the execution of the will. He had suffered from delirium tremens and some months after the execution of the will had been an inmate of an inebriates' home. Here again it was decided, as matter of fact, that he was not intoxicated on the occasion of his executing his will; and that although "his mental powers were probably never robust, and had been weakened by his excesses," they had not become so far impaired as to deprive him of testamentary capacity. There was no contention that a generally insane condition of mind existed, caused by an excessive indulgence in drink.

At page 223, FITZGERALD, S., says: "Drunkenness may so becloud the mind as to make it incapable of doing an intelligent act. But the disability ends when the exciting cause is removed. In this it differs from insanity, which, once shown to exist, is presumed to continue until there is proof that intelligence and reason have asserted themselves."

The issue in the case under consideration is, not whether Mr. Ely's mind was so clouded from the immediate and temporary

effects of alcoholic stimulants when he signed the will as to deprive him of that very small amount of intelligence necessary for a valid testamentary disposition, but whether or not he was at that time suffering from a condition of general insanity as a result of his excessive indulgence in drink over a period of many years.

The preponderance of evidence, and that of the witnesses who knew the testator longest and best and who are entirely disinterested, irresistibly leads me to the conclusion that the testator was generally unsound, and that he was generally insane at the time of the execution of the will and codicils.

Having reached the conclusion that he was insane, as a matter of fact, the conclusion of law is inevitable that he was incompetent to make a will.

Probate denied.

(Note on testamentary capacity:)

When insanity is shown to have existed, the burden rests on the proponent to show that there had been a recovery or that the will was executed during a lucid interval. (Matter of Lapham, 19 Misc. Rep. 71.)

A will made during a lucid interval, where the testimony tends to show that testator had testamentary capacity at the time, will be sustained. (Matter of Cornelius, 23 Misc. Rep. 434; Matter of Coe, 47 App. Div. 177; Matter of Evans, 37 Misc. Rep. 337.)

Testimony of witnesses in good standing that testator had testamentary capacity is not overcome by opinions of medical witnesses to the contrary, based on the fact that testator became insane three months after the execution of the will and continued insane until his death. (Matter of Lawrence, 27 Misc. Rep. 473; *affd.* 48 App Div. 83.)

In the Matter of the Accounting of the Executrix and Executor
of GERD. MARTENS, Deceased.

(*Surrogate's Court, Westchester County, Filed March, 1896.*)

1. TRUSTEES—COMMISSIONS.

Where the residue is left to executors and trustees in trust to pay the income to certain persons for life, with remainder over, and with full power of sale, they hold the legal title to the real estate as trustees, and as such are entitled to commissions not only upon the rents, but on the value of the property also.

2. EXECUTORS—TAXES ON UNIMPROVED PROPERTY CHARGEABLE TO PRINCIPAL.

Where unimproved real estate, having a prospective value, is carried by trustees for the benefit of the remainderman, the expense of carrying it, including taxes, is chargeable to principal and not to income.

Settlement of accounts of trustees.

Isaac N. Mills, for trustees; Arthur M. Johnson, for Loretto J. Martens, guardian; Stephen Lent, special guardian.

SILKMAN, S.—Two questions are presented by the special guardian for determination before the entry of the decree:

First. Is the real estate to be included in determining the value of the several trust estates for the purpose of computing trustees' commissions thereon; and

Second. Are the taxes upon the unimproved and unproductive real estate which is appreciating in value properly chargeable to principal?

The testator by the fourth clause of his will gave to his executors and trustees all the residue of his property, real and personal, in trust to divide the same into five equal parts, which they were directed to invest and reinvest in productive real and personal property, to receive the rents, income and profits of each of said shares, and after deducting the necessary and proper taxes, insurance, premiums, expenses or repairs, commissions, costs, charges and expenses, to use and apply and pay

the net rents, income and profits of one of such shares to each of his five children during life, and upon the death of any of such children the share represented by the child so dying to be paid to his or her issue, or in default of issue to his or her brothers and sisters and the issue of any deceased brothers and sisters. In a subsequent paragraph of the will full power of sale was given to the executors and trustees.

Under the provisions of this will the persons named as executors take the legal title to the real estate, coupled with a complete power of sale, but the title is in them as trustees and not as executors. Whether they are to act in reference to the real estate as executors or trustees is determined by where the legal title is. Executors as such deal with real estate only under a power in trust, and if they are seized of the legal estate they then hold as trustees. *Griffith v. Beecher*, 10 Barb. 432; *Matter of Van Wyck*, 1 Barb. Ch. 565.

Executors who are merely given a power in trust to sell real estate have no care or responsibility in respect thereto, neither have they any right to the rents and profits thereof nor possession thereof, and being charged with no duty except to sell they are not entitled to commissions thereon until they shall exercise the power of sale and convert the same. It is different with trustees, they, being possessed of the legal title to the realty, are charged with the care and responsibility thereof, and for the performance of such duties they are entitled not only to a commission upon the rents, but upon the fair value of the property as well.

The rule is well settled and wisely so, for experience proves that the care of real estate is much more onerous than the care of personal property. The personalty of each of the five trusts being accounted for is considerably less than \$100,000, but adding the fair market value of the realty, that amount is largely exceeded. The executors named are, therefore, lawfully entitled as trustees to their commissions for receiving the *corpus*

of the several trusts, their accounts as executors having been heretofore settled.

We are next brought to the consideration of the second question. It appears that the testator died possessed of certain unimproved and unproductive real estate in the city of Mount Vernon, which has been set off and partitioned among the several trusts, and which real estate is appreciating in value, and which the trustees believe by holding for a time can be sold at much larger prices than can be had for it at the present time. In view of the almost certain advance in its value and the benefit to the remaindermen consequent upon holding it, the trustees have charged the taxes thereon to principal and not to income, as is usual. The correctness of this is involved in some doubt. It is the general rule that assessments or taxes in the nature of assessments for betterments to the freehold are chargeable to principal, the life tenant suffering the loss of the interest on the amount thereof. In some cases, however, when the benefit is partially for the permanent benefit of the freehold and partially for its preservation or temporary benefit, the amount of such assessments have been apportioned between the life tenant and remainderman.

It is also the general rule that all ordinary taxes for the support of the government must be borne by the life tenant. *Hepburn v. Hepburn*, 2 Bradf. 74; *Griswold v. Griswold*, 4 id. 216; *Pinckney v. Pinckney*, 1 id. 269; *Booth v. Ammerman*, 4 id. 129; *Gillespie v. Brooks*, 2 Redf. 349.

The soundness of the latter rule cannot be questioned, but that it is of universal application and without exception I am inclined to doubt. In these days, when so much unimproved real estate is being developed and is appreciating in value, a premature sale would often entail great loss, while a judicious delay in sale for a few months or years would largely enhance the value of the estate. Equity would seem to require that the court make exceptions to the general rule, but guardedly and only when the equities are clear and beyond doubt.

And for this there is some authority. *Cram v. Cram*, 2 Redf. 244; *Matter of Kendall*, 4 Dem. 133; *Matter of Housman*, id. 404.

In the latter case Surrogate *ROLLINS* held that where property which ought to be converted is held by executors, a tenant for life is not entitled to the annual produce, but to interest at some fixed rate upon the estimated value of the unconverted property or upon the value as it may be subsequently ascertained, and cites as authority for the rule, *Covenhoven v. Shuler*, 2 Paige, 122; *Cairns v. Chaubert*, 9 id. 160; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Lawrence v. Embree*, 3 Bradf. 364.

The learned surrogate also said: "Delay in making the conversion directed by the will should not inure to the advantage of the beneficiaries for life as against the remaindermen or to the advantage of the latter as against the former, but to the advantage of the estate as a whole, and the equities should be adjusted between the successive takers," and cites *Beavan v. Beavan*, L. R., 24 Ch. D. 649; *People ex rel. Cornell University v. Davenport*, 30 Hun, 177.

It must be borne in mind that the intention of the testator in such a case as this is to benefit his children, the life tenants, who are his first consideration, and the fact that he leaves the estate in trust, and gives to his children only the income, is not so much because he desires their issue, in whom he may have no particular interest, to be benefited, but that his children shall always have support and maintenance and something to constantly remind them of a provident parent. It never could be that a father should intend that his children should live in discomfort and distress in order that unproductive and speculative real estate may be held to appreciate for the benefit of a third or fourth generation, and yet such might well happen if the general rule stated above is without exception. The Surrogate's Court being a court of equity, it must see that equity is done and that the clear intentions of a testator are fulfilled, and where it appears that unproductive and unimproved real estate

having a prospective value is carried by trustees in the exercise of a sound discretion for the benefit of the remaindermen, the expense of carrying it is to be charged to the body of the trust estate, and not to the income of the productive property or securities. In this case the trustees are directed to invest in productive real and personal property, a clear intention that the unproductive property shall not be held. If, however, it is held for a reasonable time in the exercise of a sound discretion which the law gives to trustees in order to obtain better prices, it is for the benefit of the remaindermen, who will receive the larger benefit from the enhanced value, and they must, therefore, bear the expense of carrying it, including the annual taxes, the life tenants suffering only the loss of income upon the principal so used.

Both propositions must be answered in the affirmative and a decree entered accordingly.

Decreed accordingly.

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ACCOUNTING—

The right of a creditor to compel an executor or administrator to account is barred by the statute of limitations at the end of seven years after the issue of letters. *Matter of Kirkpatrick*71

An executor or administrator may be compelled to account although more than seven and a half years has expired since his appointment. *Matter of Beyea*149

One who has been appointed receiver of a legatee in proceedings supplementary to execution against the latter may require an accounting by the executor. *Id.*

An executor will be held liable for the value of perishable property, such as plants, where their destruction was caused by his negligence. *Matter of Spears*205

Where there is a mere power of sale, the rents and expenditures on the real estate form no part of the executor's accounts. *Id.*

An executor is chargeable with the rents of leasehold property. *Id.*

The "actual and necessary expenses," for which an executor will be reimbursed, are those which were contracted in good faith and with reasonable judgment, whether with or without the advice of counsel. *Matter of Huntley* . .306

Expenditures made by an executor in the defense of claims against the estate, although incurred by advice of counsel, should not be allowed to him where, in the management of his own affairs, under like circumstances, he would not have incurred them. *Id.*

An executor should be credited with the expense of erection of a building needed for use as a storehouse for estate property, and which was of benefit to the estate and sold for an advance over its cost. *Matter of Braunsdorf* . .326

The costs of an accounting by an executor who has resigned or been removed must be borne by him, and cannot be charged against the estate. *Matter of Bevier*349

The burden of establishing that counsel fees paid by an executor were fair and reasonable and that the services charged for were necessary and proper rests on the executor. *Matter of Arkenburgh*.....380

An executor cannot be allowed for fees paid to counsel for doing things which he should have done personally. *Id.*

The surrogate has no power in the final decree to direct distribution to a sheriff who has levied an attachment upon the interest of an heir or legatee. *Id.*

An allowance for fees paid to an attorney by the executor or administrator cannot be allowed unless it is shown that the attorney's services were necessary and were actually rendered, and the amount paid for them was reasonable with reference to their character and importance and the result to the estate. *Matter of Quinn*.....412

The executor cannot be allowed for payments made to an attorney for services which the executor should have attended to personally. *Id.*

The right of legatees or next of kin to maintain a proceeding to compel an executor or administrator to account is barred by the statute of limitations at the expiration of six years from the time it accrued, viz.: one year and six months from the granting of letters. *Matter of Miller*. 506

A payment made to another than the moving party, in the absence of proof of the circumstances under which it was made, is insufficient to take the proceeding out of the statute. *Id.*

An unsigned statement of account showing a balance due to the executor or administrator does not constitute an acknowledgment or promise to pay which will prevent the operation of the statute. *Id.*

Acts of an executor or administrator in enforcing an obligation or liability to the estate will not prevent the running of the statute. *Id.*

On an intermediate accounting, to which the creditors are not parties, the executor cannot be credited with payment of an outlawed claim, although the heirs consented thereto. *Matter of Oosterhoudt*.....516

An undertaker or other person holding a claim for funeral expenses is not a creditor or person interested in the estate within the meaning of section 2727 of the Code, and

cannot maintain a proceeding to compel the executor to account. *Matter of Flint*.....542

A reasonable expenditure for mourning for the widow and minor daughter is a legitimate part of the funeral expenses. *Matter of Wachter*.....552

See BURDEN OF PROOF; COMMISSIONS.

ACKNOWLEDGMENT—

See EXECUTION OF WILL.

ADEMPMENT—

A legacy to a church for the purpose of paying off a mortgage thereon is not adeemed by a reduction of the mortgage before testator's death by subscriptions, except to the extent that subscriptions made by the testator contributed thereto.

Matter of Gasten.....549

ADMINISTRATION—

Where a residuary legatee applies for letters of administration, he need not cite anyone. *Matter of Richardson*. 57

A temporary administrator should be appointed where probate is delayed by a contest and the estate consists largely of unsecured notes. *Matter of Eddy*.....163

Where there are conflicting interests, a person interested in the estate should not be appointed administrator. *Id.*

A devise to "the Sisters of Charity attached to" a certain church, where the body named is not incorporated, cannot be sustained on the theory that it is given to the individuals composing such body, so as to entitle one of them to letters of administration. *Matter of Owens*.....235

The order of priority in cases of administration with the will annexed, as fixed by section 2643 of the Code, is not affected by the provisions of section 2693. *Matter of Manley*282

No degree of moral guilt or delinquency will disqualify a person from acting as administrator, unless he has actually been convicted of a crime. *Id.*

Drunkenness, improvidence or want of understanding, to disqualify, must amount to habitual drunkenness or a lack of intelligence. *Id.*

Where, at the time executors and trustees are permitted to resign, the residuary estate has been ascertained for the purposes of the trust, an administrator with the will annexed should not be appointed. *Matter of Curtiss*....530

ADOPTION—

The adoption papers in the case of an illegitimate child need not show the fact of its illegitimacy; it is sufficient that such fact was shown on the examination. *Matter of Gregory*293

ADVANCEMENTS—

Unless the will so requires, either by express terms or necessary implication, interest is not chargeable on advancements. *Matter of Keenan*.....450

ALTERATIONS IN WILL—

Alterations and erasures, made after execution, do not invalidate a will if testator's original intention can be ascertained. *Matter of Lang*.....127

ASSETS—

Where the testator's land was worked on shares, his share of the avails of milk taken to the cheese factory, which were paid to the administrator, do not go to the heirs at law as rent of the farm, but are assets of the estate. *Matter of Strickland*179

BEQUESTS—

A direction in the will of a Roman Catholic that the executor cause masses to be said for testatrix and her deceased husband for any balance left after payment of debts and funeral expenses is valid, and authorizes the expenditure of a reasonable amount for that purpose. *Matter of Backes*.

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See LEGACY; WILL.

BILLS AND NOTES—

The right of action against an indorser is governed by the law of the State in which the indorsement was made, although the note is payable in another State. *Matter of Oosterhoudt*.....516

BURDEN OF PROOF—

The burden of proving that debts paid by the administrator did not exist and were not paid in good faith rests on the contestant. *Matter of Smith*.....337

CLAIMS AGAINST DECEDENT—

The rule that claims not presented during the decedent's life should be closely scrutinized does not apply to a case where, by the terms of the agreement, no right of action exists until the debtor's death. *Matter of Hoag*.....341

CHARITABLE BEQUESTS—

Where a decedent leaves a husband, wife, children or parents, bequests to charitable corporations in excess of one-half the estate are void. *Matter of Stone*.....461

COLLATERAL INHERITANCE TAX—

The mere fact that the executors were ignorant of the law and that payment of the penalty for non-payment of the tax would be a hardship on the estate is not a ground for relieving them from such penalty. *Matter of Platt*. 61

Where the equity in land devised is less than \$500, it is exempt from the collateral inheritance tax. *Matter of Kené*65

The law in force at the death of the decedent governs as to the rights accrued and liabilities incurred. *Matter of Sterling*67

Under the Collateral Inheritance Tax Law as it existed prior to the act of 1892, the \$500 limitation referred to the interest of the legatee or distributee, and not to the estate of the decedent. *Id.*

The concealment of facts by an administrator is no ground for setting aside an appraisal made under the Act of 1885. *Matter of Smith*.....397

An error of the appraiser, in refusing to appraise a judgment in favor of the estate against one entitled to share in the estate, is not ground for setting the appraisal aside, but can be corrected only by appeal. *Id.*

See **TRANSFER TAX**.

COMMISSIONS—

A temporary administrator is entitled to commissions on property specifically bequeathed. *Matter of Egan*.....40

Where the estate exceeds \$100,000 over all debts and one of two executors dies before full administration, the estate of the deceased executor is entitled, on final settlement, to a full commission on all property paid out or distributed at the time of his death and a half commission on all property distributed thereafter, and the surviving executor to a full commission and a half commission on the property distributed after his co-executor's death. *Matter of Newland*62

Where the realty is left to one class of persons and the personalty to another class, and each fund is administered by one of the executors, who render separate accounts, each class must bear the expenses of the accounting as to the fund in which it is interested and each executor is entitled to commissions on the fund he represents. *Matter of Mansfield*158

Where, prior to his removal, a trustee has paid over the entire income to the beneficiary without deducting his commissions and has turned over the securities to his successor, the surrogate has no jurisdiction to direct his successor to pay him the commission. *Matter of Bevier*..349

Where the residuary estate is given to the executors in trust to pay the income to the widow and children during their lives, and the principal to their heirs at their respective deaths, their duties as executors and trustees are separate and distinct and they are entitled to double commissions. *Matter of Curtiss*.....530

Where the estate is given directly to the executors and trustees, and it is not necessary to convert the securities into cash for the payment of debts, they may retain such securities in their original form and are entitled to commissions thereon. *Id.*

In such case they are not entitled to commissions on the proceeds of the sale of real estate where such sales were not necessary for the payment of debts and legacies. *Id.*

No values can be estimated on land in order to fix commissions in advance of its conversion into money, nor can commissions be allowed on unsold lands. *Matter of Clinton*557

The value of the unadministered estate may be shown for the purpose of determining whether commissions may be allowed to each executor, but they are not entitled to more compensation than for the moneys actually received and paid out. *Id.*

CONFLICT OF LAW—

See **BILLS AND NOTES; DISTRIBUTION.**

CONSULS—

The consul-general of Italy has, under the treaty with that country, power and authority to demand and, on giving the proper receipt, to receive the distributive shares in an estate which belong to persons in his country and have been deposited in court. *Matter of Tartaglio*.....263

CONTEMPT—

An executor should not be punished for contempt in failing to comply with a decree, where he satisfies the court that an appeal will be taken which may result in a reversal or modification of the decree. *Matter of Arkenburgh*.503

CONTRACTS—

An agreement by one who has been paying board, but feels unable to continue, that in return for care and maintenance the party furnishing it shall have whatever property such person may die possessed of, is valid and enforceable. *Matter of Hoag*.....341

Where claimant has furnished board under an agreement that he shall have whatever property the decedent left at her death, he is entitled to the entire residuum, without proof of the extent or value of such maintenance. *Id.*

DEPOSITIONS—

A surrogate has power to order the examination of an aged, sick or infirm witness who resides in another county, other than a subscribing witness to the will, to be taken before a referee in such county. *Matter of Gee*.....238

DETERMINATION OF VALIDITY—

A party to an action to determine the validity of a will, who appeared therein, is concluded by the judgment in

- . favor of its validity, and cannot maintain an action to revoke its probate. *Matter of Ruppaner*.....445

The mere omission of necessary parties to such an action is not available to a party thereto for the purpose of attacking the judgment. *Id.*

DEVISE TO CLASS—

Where it is apparent that testator intended to divide his estate between two branches of his family by class, although the members thereof are mentioned by name, the antecedent death of one of the members of a class does not create a lapse, but his share passes to the survivors of his class. *Matter of Keenan*.....450

DEVISEES—

One to whom land subject to a mortgage is devised must pay such mortgage from his own property, without resort to the executor, unless the will provides otherwise. *Matter of Kene*.....65

A devisee cannot be charged with taxes and insurance on the premises devised to him which accrued while the title was in testator's name. *Matter of Arkenburgh*.....380

DISCOVERY—

If a person cited to appear for examination as to property in his possession alleged to belong to the decedent files a verified answer claiming the ownership or right of possession by reason of a lien or special property therein, the surrogate is thereby ousted of jurisdiction, and the examination cannot be continued for the purpose of procuring the disclosure of knowledge or information as to such property which the witness may have. *Matter of Basch*...239

DISTRIBUTION—

The distribution of a decedent's personal estate is governed by the law of the decedent's domicile at the time of his death. *Matter of Ruppaner*.....445

As between the life tenant and remaindermen, repairs which permanently improve the real estate should be charged to principal, and not to income. *Matter of Braunsdorf*.....326

Where unimproved real estate, having a prospective value, is carried by trustees for the benefit of the remainderman, the expense of carrying it, including taxes, is chargeable to principal and not to income. *Matter of Martens*.....608

See CONSULS; EXECUTORS.

EQUITABLE CONVERSION—

It is the intent of the testator, and not the practical convenience of treating the estate in one form rather than another, that is to govern the determination as to whether there is an equitable conversion under a will. *Matter of Cobb*.....402

The mere fact that the inventory shows an insufficiency of assets to pay all legacies and trusts and that a naked power of sale is given to the executors, is insufficient to show an intent to create an equitable conversion where some of the legacies have lapsed and it appears that the securities have greatly depreciated. *Id.*

ESTOPPEL—

Decedent left two wills, by the first of which she gave her husband a life estate in realty and by the second gave him the fee. He procured the probate of the first and recognized the rights of the remainderman until his death. *Held*, that he and those claiming under him were estopped by his acts from setting up and proving the second will. *Matter of Lyman*.....420

Mere silence will not estop except in cases where there is not only a right, but a duty to speak. *Matter of Oosterhoudt*.....516

EVIDENCE—

The testimony of officers of a religious or charitable corporation, who serve without pay or reward, is not incompetent under section 829 of the Code. *Matter of O'Rourke*.

270

A witness, though a party and interested in the event, is not incompetent under section 829 of the Code to testify to personal transactions or communications between the decedent and another, in which the witness took no part. *Matter of Hart*.....378

Where the testator undoubtedly possessed testamentary capacity at the time of the execution of the will, his declarations made before or after that time are not admissible to show fraud or undue influence. *Matter of Metcalf* . . . 571

EXECUTION—

An execution to enforce a surrogate's decree directing the payment of a sum of money by an executor should run against the property of the executor, and not against that of the estate. *Matter of Waring* 49

EXECUTION OF WILL—

Presentation of the will to the witnesses with the signature in plain sight is a sufficient acknowledgment. *Matter of Lang* 127

Facts sufficient to establish that testatrix signed and acknowledged her will in the presence of the witnesses. *Matter of Sanderson* 139

Where provisions relating to the sale and disposition of the estate intervene between the signature and the attestation clause, there is no signing at the end of the will. *Id.*

An acknowledgment of a will may be made either directly by words or as an affirmative answer to a question. *Matter of Seagrist* 210

Where there are no circumstances indicating want of good faith, testimony of the draftsman as to instructions received from the testator and that he followed them is sufficient to show knowledge by testator of the contents of the instrument. *Id.*

Exhibition to the witnesses of a piece of apparently blank paper, with the remark that "this is my will," or "I have made my will; I want you to sign it," is not an acknowledgment of a subscription within the meaning of the statute. *Matter of Eakins* 368

A substantial compliance with the requirements of the statute in relation to the execution of wills is sufficient. *Matter of Menge* 374

An affirmative answer to a question by the scrivener as to whether the testator wished the persons present to witness the will is a sufficient publication of the will and a valid request to the witnesses to attest the will. *Id.*

A substantial compliance with the statutory requirements is sufficient. *Matter of Carey*.....414

It is not absolutely necessary that the witnesses be together when they attest the will. *Id.*

Proof that testatrix gave an affirmative sign in answer to a question whether she asked the witnesses to sign is insufficient to prove such request where it appears that she was under the influence of opium at the time. *Matter of Lyman*420

It is not necessary that the witnesses should see the mark made by the pen, or its actual contact with the paper; it is sufficient that they see it in testator's hand and hear its scratching on the paper. *Matter of Van Houten*.....432

Publication of a will may be made by an affirmative answer to a question or even by a sign. *Matter of Murphy*.
466

The publication and a request to the witnesses to sign may be incorporated in the same words or acts. *Id.*

EXECUTORS—

An application for letters by an executor who has renounced, but has retracted the renunciation, is addressed to the discretion of the surrogate, and should be denied where such person is aged and infirm and the estate is large and complicated. *Matter of Cornell*.....1

Where the will designates a person to succeed the executor in case of his death, the surrogate has power, in such event, to issue letters to such person. *Id.*

One who has acted as an executor without having qualified or received letters testamentary cannot be removed or resign, as he is not a legal executor. *Matter of Richardson*57

Where an insurance of property extends beyond the life of the life tenant, the estate of the life tenant can only be charged with a proportionate part of the premium. *Matter of Wyatt*104

An administrator with the will annexed is not liable for a *devastavit* or misapplication of funds by his predecessor, especially after a decree settling the accounts of such predecessor. *Matter of Lamb*.....190

It is the duty of the executor to convert the personal property, especially such as requires expense for its care, as soon as possible. *Matter of Spears*.....205

Where an executor, at the request of the heirs, continues a manufacturing business of the testator and renders services for which he is peculiarly fitted by a mechanical training, he is entitled to reasonable compensation therefor in addition to his commissions. *Matter of Braunsdorf*...326

An executor has no right to sell personal property on credit except for payment of debts and legacies, and if he does so, will be held personally liable for all losses and expenses which occur by reason thereof. *Matter of Woodbury*.....362

The approved security required in such a case must consist of national or State bonds or real estate mortgages, and must be approved by the surrogate. *Id.*

An executor may renounce the specific compensation provided by the will and claim the statutory commissions at any time before the decree. *Matter of Arkenburgh*...380

The burden of proving an indebtedness of the executor to the estate rests on the contestant who seeks to surcharge the account. *Id.*

Where executors transfer to legatees personal property specifically bequeathed to them and make no provision for the payment of the debts, they are guilty of a *devastavit* and personally liable therefor. *Matter of Oosterhoudt*.516

Where executors have transferred personal property to the legatees to whom it was specifically bequeathed, and allowed the devisees to take possession of the real estate, without taking any measures to provide for payment of the debts, they cannot be allowed for discounts paid by them to raise money to pay such debts. *Id.*

An executor cannot resign, and can only be relieved by an application for the revocation of his letters. *Matter of Curtiss*.....530

An executor or administrator is not liable for failure to take legal steps to recover alleged assets of the estate, where there were reasonable grounds for believing that such steps would be entirely ineffectual and he acted in good faith. *Matter of Hall*.....563
See ADMINISTRATION; ASSETS; COMMISSIONS; CONTEMPT.

GIFTS—

If the subject of an alleged gift is a debt of the donee, it must be established by instruments in writing; mere declarations of the testatrix that the debt was paid by services is not sufficient. *Matter of Gregg*.....222

The nature of the delivery essential to constitute a gift depends on the character of the thing given and the relative situation of the parties. *Matter of Wachter*.....552

Where the gift has been made complete, subsequent possession of the donor, if satisfactorily explained, will not divest the title of the donee. *Id.*

One who has testamentary capacity is competent to make a gift *causa mortis*. *Matter of Hall*.....563

A certificate of deposit is a proper subject of a gift *causa mortis*. *Id.*

A delivery to a third person for the donee is sufficient, although the donor dies before the property is handed to the donee. *Id.*

GUARDIAN AND WARD—

The right of a guardian to the custody of his ward is not an arbitrary one, but he must make such disposition of the ward's custody as will best promote his interests. *Matter of Wentz*99

Where the ward is well cared for and attached to the person with whom he resides, the guardian is not justified in refusing to contribute to his support on the ground that he refuses to leave such person and reside with the guardian. *Id.*

The issuing of letters of guardianship is not necessarily a judicial act. It is the order and not the letters that appoint. *Matter of Atwood*.....169

An ancillary guardian who is also the general guardian, and as such has given the bond prescribed by section 2838 of the Code, is not required to give the bond prescribed by section 2746 in order to entitle him to receive legacies due to his wards. *Matter of Hunt*.....241

Since the passage of chapter 175, Laws of 1893, a father cannot by will appoint the surviving mother as guardian of his infant children. *Matter of Alexandre*.....288

HUSBAND AND WIFE—

A separation agreement is annulled by any subsequent cohabitation, in the absence of proof that it was intended to be anything else than a permanent resumption of the marital relation. *Matter of Smith*.....337

The right of a husband to recover for services rendered by his wife is not affected by the Married Woman's Act. *Matter of Hoag*.....341

INTEREST—

An unliquidated claim which is to be adjusted and paid in the course of administration does not draw interest. *Matter of Hartman*.....378

On final distribution, interest is not chargeable on moneys paid by direction of the court on a former partial distribution. *Matter of Keenan*.....450

See **ADVANCEMENTS**.

JURISDICTION—

A surrogate has jurisdiction to construe a will on an accounting. *Matter of Metcalfe*.....16

On an accounting by executors the surrogate has jurisdiction to construe the will. *Matter of Havens*.....88

Where a legatee claims the entire legacy and another claims as assignee of the whole or a part thereof, the surrogate has jurisdiction to determine the controversy between them. *Id.*

On probate, a surrogate has no power to construe a will which embraces real and personal property so blended as to prevent a construction as to one species without involving the other. *Matter of Morganstern*.....117

An independent proceeding for the construction of a will cannot be entertained. *Matter of McClouth*.....122

See **DISCOVERY**.

KNOWLEDGE OF CONTENTS OF WILL—

Where the will of an illiterate testatrix was read over to her by the scrivener before execution, it will be assumed that he read it correctly, and all of it, and that her statement that it was all right was made with knowledge of its contents. *Matter of Murphy*.....466

Where testator was able to read writing and to transact business, his knowledge of the contents of the will may properly be inferred. *Matter of Metcalf*.....571

LEASE—

An executor who is a lessee of property belonging to the estate cannot hold the estate liable for repairs made by him thereon where the lease contained no covenant requiring the lessor to repair and his co-executor made no promise of re-payment. *Matter of Brockway*.....265

LEGACY—

Where, in a will made a short time before testator's death, the realty and personalty are blended in the residuary clause and the executor is given power to sell all the property if necessary to fulfill the bequests, general legacies do not abate because of insufficiency of the personalty to pay them in full. *Matter of Spencer*.....78

A bequest cannot be held void for uncertainty as to the legatee where the person or corporation intended can be determined with reasonable certainty from the words used alone or in connection with extrinsic evidence. *Matter of Lang*127

The law of the legatee's domicile controls as to the validity of a bequest. *Id.*

The mere formal appearance of a legatee and cross-examination of the witnesses on probate is not such opposition as will forfeit the legacy under a provision forfeiting it if the legatee prevents or opposes the will. *Matter of Bratt*174

But the bringing of an action against the executor for conversion of property to which the legatee claimed ownership, but which the testatrix had bequeathed to others, will forfeit the legacy. *Id.*

So also, the failure to comply with conditions as to testatrix's burial will forfeit the legacy. *Id.*

See ADEPTION; BEQUESTS.

LIFE ESTATES—

A bequest to a widow of the use of a specified sum for life, with the right to use as much of the principal as she might require, gives her no vested right in the principal,

and where she does not make any claim therefor during her life for her support, but expends her own money, her executor cannot recover the amount so expended by her. *Matter of Traver*.....143

A life tenant is only entitled to possession of such of the personal property as can only be used by having possession, and not to the custody of money and securities. *Matter of Beyea*149

If a tenant for life makes improvements upon the premises, he cannot claim compensation therefor from the remainderman. *Matter of Lamb*.....190

In the absence of any other provision showing testator's intent, a devise of land to one "and at her decease to become the property of her son," will be held to give a life estate to the former and to vest the fee in the son. *Matter of Grover*286

Where a life estate is given to the widow, a subsequent clause requiring her to maintain the estate in as good condition as possible does not charge testator's debts upon her income. *Matter of Maack*.....299

Where the property consists of a dairy farm, the life tenant is not chargeable with the produce on hand at testator's death, which was actually used and consumed on the farm. *Id.*

See WILL.

LIMITATION—

Where a debt is paid by a surety after the death of the principal, the statute does not begin to run against his claim for reimbursement until the appointment of an administrator. *Matter of Howard*.....214

See ACCOUNTING; BILLS AND NOTES; PAYMENT OF DEBTS, ETC.; REVOCATION OF PROBATE.

PARENTAL RELATION—

The relation of parent and child does not exist between an uncle and niece, within the meaning of section 2 of the Transfer Tax Law, where he merely resided with her mother and contributed toward the household expenses in common with the other members of the family, and it does not appear that he ever called her his child or spoke of her as his daughter, or that she called him father. *Matter of Moulton*.....257

The exemption in the Transfer Tax Law in favor of persons toward whom testator has stood for ten years in the mutually acknowledged relation of a parent is not limited to illegitimate children, but includes any person who has been brought up by him as a child for the requisite time, and who has recognized him as a parent. *Matter of Stillwell*. 313

PAYMENT OF DEBTS AND LEGACIES—

Knowledge of the executor or administrator of the existence of claims against the estate does not avoid the necessity of due presentation of such claims. *Matter of Morton*. 19

Claims must be presented in some writing stating the nature and amount of the claim, the name of the owner, and demanding payment. *Id.*

Where a claim is not presented within a reasonable time after publication of the notice to creditors, the claimant cannot complain of a disposition of the personalty made with the consent of the persons interested. *Id.*

An application by the general guardian of an infant legatee, made after the expiration of one year, for payment to him of the legacy and authority to apply it to the infant's support, cannot be granted under section 2722 of the Code, as the general guardian is not a person entitled to the legacy within the meaning of that section. *Matter of Paton*. . 23

Section 2722 of the Code does not authorize the payment of part of a legacy, except where there are not sufficient funds to pay all, and there has to be an abatement of legacies or a *pro rata* share of the debts fixed. *Matter of Mansfield*. 28

An application for payment of a legacy cannot be granted where the facts on which it is based are disputed by the answer. *Id.*

Section 2739 of the Code, suspending the operation of the statute of limitations on a debt due the executor until his final accounting, does not apply to a claim of a third party assigned to the executor. *Matter of Robbins*. . . 32

Claims against an estate are barred by the statute in seven years and six months from their maturity, although they have been duly presented to and admitted by the executor, and can only be renewed by a payment, acknowledgment or promise in writing, signed by him. *Id.*

A petition by the executor for leave to sell a legacy due the decedent, which states the names of creditors and the nature of their claims, is a sufficient acknowledgment to stay the running of the statute as to them. *Id.*

Judgments recovered against the decedent in his lifetime are to be paid in the order of their docketing, irrespective of the time when the assets or fund were acquired. *Matter of Foster*.82

Where the answer in a proceeding to compel payment of a legacy complies with the requirements of the statute and shows that the determination of the petitioner's rights will involve a construction of the will, the proceeding must be dismissed. *Matter of McClouth*.122

Legacies which are directed to be paid out of converted real estate must be paid in full, without deducting for expenses of administration or commissions, where the other personal property is sufficient to pay all other legacies in full and such expenses and commissions. *Matter of Tompkins*.125

Although there is an equitable conversion of the realty, no part of the proceeds can be used for the payment of debts so long as there is sufficient personalty for that purpose. *Matter of Mansfield*.158

Taxes which were fixed at testator's death constitute a debt and are payable from the personalty. *Id.*

A direction in the will that insurance and repairs shall be paid out of the rents of realty which is directed to be sold does not indicate an intention that taxes accruing after testator's death should be paid from the personalty. *Id.*

Where there is an equitable conversion of the realty and there has been a delay in its sale, the surrogate may direct the payment of a legacy where the entire estate is sufficient to pay all debts and legacies which are entitled to priority or equality of payment. *Matter of Travis*.161

A provision that the expenses of educating an infant legatee shall be charged against his share covers the services of doctors, dentists and oculists rendered to, and medicines furnished to him while at college. *Matter of Atwood*.169

An executor or administrator has no power to waive, as against the heirs at law or devisees, any legal defense under

the statute of limitations or the statute of frauds. *Matter of O'Rourke*270

Where the next of kin and heirs at law are the same persons and they have received their respective shares of the personal property, it is immaterial that the proceeds of a sale of realty were used to pay debts. *Matter of Braunsdorf*.326

An executor has no authority to allow a claim against which the statute of limitations has run. *Matter of Oosterhoudt*.516

POWER OF SALE—

Where the realty and personalty are blended, a power given the executor to sell all the property if necessary to fulfill the bequests authorizes him to sell the realty. *Matter of Spencer*.78
See TRUSTS.

PRACTICE—

A citation may be served within the State upon a non-resident in the same manner as on a resident. *Matter of Washburn*.268

The return day of a citation is wholly unimportant as respects the jurisdiction of the surrogate, provided it is not less than eight days nor more than four months after its date, and may be fixed to suit the convenience of the surrogate and the petitioner. *Id.*

Where the office of a surrogate becomes vacant by his death or expiration of his term after he has filed an opinion, but before he has rendered a decision in a proceeding for an accounting, the proper course for his successor to pursue is to continue the proceeding from the point where it was left, and upon the evidence previously taken, and any additional profits that may be offered, to make the proper decision. *Matter of Winslow*.277

To confer jurisdiction on the surrogate in probate proceedings, citations must be issued and served; waivers of service cannot be accepted in lieu thereof. *Matter of Gregory*.293

The amendment of 1894 to section 1022 of the Code does not apply to referees in Surrogate's Courts, so as to relieve them from the duty of stating separately their findings and conclusions of law. *Matter of Havemeyer*. .395

PROBATE—

Where one of the subscribing witnesses cannot be produced and no other persons were present at the execution of the will, testimony of the other witness, if his character is unimpeached, when supported by the apparent good faith of the transaction and a full attestation clause, is sufficient to prove that testator made his mark. *Matter of Hyland.*

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Where, at the time of the execution the testatrix was in *extremis* and could only answer questions by a nod, and upon application for immediate probate one of the legatees was represented by a stranger and the names of infant legatees suppressed, *held*, that the facts were so suspicious that probate should be refused. *Matter of Graf.*155

Where the petitioner for probate of a will has knowledge that proceedings for adoption of a child were taken by the testator, he has no right to pass upon the validity of such proceedings, but should allege the facts in his petition. *Matter of Gregory.*293

Where one of the subscribing witnesses is dead and the other has not been heard from in six years, the will may be admitted to probate on proof of the handwriting of the testator and witnesses, and declarations of testator as to its execution. *Matter of Oliver.*318

A will may be admitted to probate although one of the witnesses denies that the usual formalities were observed. *Matter of Menge.*374

Where there is a contest as to what took place, the attestation clause is to be considered as bearing on that question. *Id.*

A will may be admitted to probate against the evidence of the subscribing witnesses; or where, by reason of want of recollection, they cannot make the proofs prescribed by law. *Matter of Carey.*414

Where the attestation clause and surrounding circumstances satisfactorily establish the due execution of the instrument, it should be admitted to probate even against the testimony of the subscribing witnesses. *Matter of Van Houten.*432

Where the will was signed by testator's mark and one of the witnesses has died, the handwriting of the latter may be proved and the testimony of the surviving witness, who

saw the mark made, will be sufficient to prove due execution. *Matter of Murphy*.....466

Where the natural objects of a testator's bounty have been ignored, and the will is presented for probate by a stranger, who is the sole beneficiary, he must show that it represents the free and unconstrained wish of the testator, and that there were good reasons for the disinheritance of kindred. *Matter of Carland*.....486

See ESTOPPEL; REVOCATION OF PROBATE.

PUBLICATION—

See EXECUTION OF WILL.

REFERENCE—

See PRACTICE.

REVOCATION—

An unmarried woman, while living in New Jersey, executed a will and subsequently married a resident of that State, with whom she thereafter removed to this State. *Held*, that the law of this State governed, and that her will was revoked by her marriage. *Matter of Coburn*.....119

Shortly before his death, testator had differences with his brother, which he settled by conveying to him real estate which he had devised to one of his daughters. With the will was found a codicil, written partly upon it, which simply modified it in a few particulars, and was evidently intended to readjust said daughter's share, but the signature to such codicil was erased by testator by drawing ink lines through it. *Held*, that the will was thereby revoked. *Matter of Brookman*.....252

Adoption of a child does not operate as a revocation of a prior will of the adopting party. *Matter of Gregory*..490

REVOCATION OF PROBATE—

Where the petitioner is estopped or otherwise disqualified to maintain a proceeding for revocation of probate, an assenting respondent cannot be substituted in his place and allowed to continue the proceeding. *Matter of Ruppenar*.
445

Where the issues of probate were tried by a jury, the statutory limitation of one year begins to run from the

entry of the findings, and not from the time they were filed in the Surrogate's Court. *Id.*

A proceeding to revoke probate is instituted by the filing of the petition within the statutory time, and citations may issue thereafter from time to time to bring in necessary parties. *Matter of Laytin*.....496

Neglect of the petitioner to proceed further after filing the petition is not ground for dismissal, as the executor may, in such case, apply for citations. *Id.*

SALE OF REAL ESTATE—

An unexplained omission from the petition of the names or ages of any of the heirs at law is a jurisdictional defect. *Matter of Slater*.....8

Unless the notice to creditors has been published for the requisite period, the creditors must be cited as a class and the citation published. *Id.*

The petition must state whether the property is occupied and, if so, must give the names of the occupants. *Id.*

The surrogate has jurisdiction to entertain an application by the purchaser to be relieved from his purchase on the ground of jurisdictional defects in the proceedings. *Id.*

One who holds a claim for funeral expenses is not a creditor of the decedent so as to entitle him to maintain a proceeding for the sale of the real estate to pay the same. *Matter of Corwin*.....167

A proceeding to sell real estate for the payment of debts may be maintained, although there has been no judicial settlement of the accounts of the administrator; but in such case the petitioner must show affirmatively that all the personal property applicable to the payment of debts and funeral expenses has been so applied, or that the executors or administrators have used reasonable diligence in converting and applying the personal property to the payment of debts and funeral expenses, and that it is insufficient. *Matter of Howard*.....214

The fact that, in such a proceeding, the claim of the petitioner is disputed does not deprive the Surrogate's Court of jurisdiction to determine its validity. *Id.*

The fact that the devisees have quitclaimed their interests to a claimant against the estate does not deprive him of

the right to maintain a proceeding to sell the real estate to pay his claim. *Id.*

A judicial settlement of the accounts of the executor or administrator is not a jurisdictional prerequisite to the institution of a proceeding to sell real estate for the payment of debts; but where there has been no settlement he assumes the burden of showing affirmatively the jurisdictional facts. *Matter of Plopper*.....489

Proof that the intestate had no personal property at his death is sufficient to make out a case for a sale of the realty for the payment of debts. *Id.*

Costs recovered in an action against the surviving partner of the decedent upon a firm indebtedness cannot be allowed in a proceeding for the sale of real estate for the payment of debts. *Matter of Stowell*.....492

A decree for the sale of real estate for the payment of debts cannot be made without proof of the facts required by the statute to be shown, although the application is not opposed. *Matter of Lichtenstein*.....499

See SUBROGATION.

SERVICES—

The fact that a married daughter left her home to care for her father, at his request, and that he stated that he had money to pay for her services and that she would be paid, is sufficient to overcome the presumption, arising from their relationship, that her services were gratuitously performed. *Matter of Strickland*.....179

In the absence of a contract, express or implied, to pay for services rendered by a child, no claim therefor can be made, as it will be presumed that such services were gratuitous. *Matter of Dusenberry*.....208

Declarations by a father, made during the absence of the daughter, and not communicated to her, that she "ought to be paid," and that "she should be paid for what she did for him," are not sufficient to overcome such presumption. *Id.*

SET OFF—

The right of the administrator to retain from the share of a distributee the amount of a debt due from him to the decedent is not affected by the fact that the debt is barred by the statute of limitations. *Matter of Smith*.....397

A debt due to the estate from a legatee may be set off against the legacy, although such debt is barred by the statute of limitations. *Matter of Foster*.....428

In the absence of language in the will, or extrinsic proof, showing such an intention, the fact that a legacy was given to a debtor does not release or extinguish the debt. *Id.*

STATUTE OF FRAUDS—

An agreement for the purchase of a cemetery lot is not one for a mere license, but for an easement in land, and if not in writing is void under the statute of frauds. *Matter of O'Rourke*.....270

The interment of the decedent's remains in the lot by his administrator is not a part performance which will take the agreement out of the statute of frauds as against his heirs at law. *Id.*

SUBROGATION—

Where a widow, before her appointment as administratrix, pays a debt of her intestate out of her own property, she is entitled to be reimbursed from the estate, or from the proceeds of a sale of the realty, if the personal property is insufficient. *Matter of Plopper*.....439

SURROGATES' COURTS—

A surrogate has power to open his decree on application of a party who was cited, but who was sick and unable to transact business at the time and who probably had no actual knowledge of the hearing. *Matter of Traver*....143

See DEPOSITIONS; JURISDICTION.

SUSPENSION OF ALIENATION—

A will bequeathed the income of a specified sum to three persons, the principal of the share of either on his or her death to go to his or her children, if any; if none, the income of such share to go to the survivor or survivors, and the principal to the children who survived all three. *Held*, that as to the share of the one first dying the bequest was void as suspending the absolute ownership for three lives; but that as to the shares of the other two it was valid. *Matter of Ewen*.....50

The provisions of a will as to the suspension of the power of alienation and of absolute ownership are valid to the extent of two lives in being at testator's death, although testator has attempted to accomplish a further suspension, or to make any other unlawful disposition of the remainder. *Matter of Corlies*.....247

TESTAMENTARY CAPACITY—

Mistakes which are a result of a failure of memory incident to old age and which do not obscure testator's intention are insufficient to establish want of testamentary capacity where there is testimony of mental competency. *Matter of Lang*127

A mistaken belief as to a relative's character is not insanity and will not avoid a will deliberately prepared and properly executed. *Id.*

One who is able to call to mind the character and extent of his property and express his wishes in regard to its final disposition has testamentary capacity, although he is very feeble. *Matter of Seagrist*.....210

One who is able to comprehend his act, understands the nature and extent of his property and knows the persons who are the subjects of his bounty, has testamentary capacity. *Matter of Carey*.....414

Eccentricities, religious beliefs, peculiarities, and even impairment of mind, do not render a person incompetent to execute a will. *Matter of Halbert*.....476

There is no presumption of incapacity by reason of advanced age. *Id.*

If one can comprehend the act he performs, knows the persons who are the subjects of his bounty, understands the nature and extent of his property, is able to retain these matters in his mind during the execution, and the testamentary act is free from delusions, he has testamentary capacity. *Id.*

To establish incapacity by reason of the use of intoxicating liquors, it must be shown that testator was in fact intoxicated at the very time that the will was executed, or that his mind was so clouded by drink that he was incompetent to give expression to his real intentions. *Id.*

Testamentary capacity is not affected by a belief in spiritualism, where no delusion arising from such belief

entered into the preparation or execution of the instrument. *Id.*

Incapacity to make a will will not be inferred from advanced age nor from an enfeebled condition of body and mind. *Matter of Metcalf*.....571

A mere misstatement of the executor's Christian name is not sufficient to show testamentary incapacity. *Matter of Buchan*.....578

The fact that testator had irrational moments is insufficient to show incapacity, where he was of sound mind when he executed the will. *Id.*

Where it is shown that general insanity existed as an habitual condition of mind, the proofs must show clearly that at the time the will was executed there was an absence of the disease itself, and not merely of its apparent delusions. *Matter of Ely*.....587

Evidence sufficient to show incompetency because of alcoholic insanity. *Id.*

TRANSFER TAX—

The interest of an infant decedent in a fund realized on a sale in partition is not real estate, and, therefore, is not exempt from taxation by section 2 of the Transfer Tax Act of 1892. *Matter of Stiger*.....36

While a transfer tax remains in the hands of the county treasurer, the surrogate has power, on reversal, to direct him to refund it. *Matter of Park*.....86

The exemption of religious corporations in section 2 of the Transfer Tax Law of 1892 does not apply to foreign corporations. *Matter of Fayerweather*.....98

A transfer of a beneficial interest which occurred under a will made prior to the passage of chapter 399, Laws of 1892, or of the previous acts is not subject to the transfer tax, although it did not vest in actual possession until after such passage. *Matter of Forsyth*.....185

An estate or interest derived from a power of appointment executed after the passage of the Transfer Tax Act of 1892 is subject to the tax, although the power was created by a will executed prior to the passage of such act. *Matter of Brooks*.....188

The amount received by a legatee on an assignment of the legacy is not a proper basis for the assessment of the trans-

fer tax; the proper basis is the existence of assets in the executor's hands. *Matter of Weed*.....200

Where the remainder after a life estate is made contingent upon the remainderman surviving the life tenant, with a limitation over in case of his not doing so, the interest of the remainderman is not presently taxable, and the appraisal thereof should be adjourned until his rights become actual and fixed. *Matter of Westcott*.....243

The words "husband of a daughter" in section 2 of the Transfer Tax Law of 1892 include the husband of a deceased daughter, even though he has remarried. *Matter of Ray*.....356

The fact that the entire estate was distributed before the transfer tax was assessed is not a legal excuse for its non-payment. *Matter of Hackett*.....400

An objection to the amount of the assessment cannot be raised for the first time on a motion to compel payment of the tax. *Id.*

Although there be an equitable conversion, it does not take effect until testator's death; and where the realty as such would be exempt under section 2 of the act, a legacy payable from the proceeds thereof is also exempt. *Matter of Cobb*402

Moneys of a non-resident decedent which are deposited in savings banks in this State, or which are in the hands of his attorney here, are subject to the transfer tax. *Matter of Burr*.....408

The doctrine that personal property follows the person of its owner does not apply where the securities representing such property or documentary evidence thereof are within this State. *Id.*

The mere fact that by the terms of the will there is an equitable conversion does not render the real estate taxable as personalty. *Matter of Sutton*.....459

Mortgage debts of testator should not be deducted from the personalty in appraising the value of the estate. *Id.*

See PARENTAL RELATION.

TRUSTEES—

Where executors hold a fund as trustees with power to expend as much thereof in the support and care of the *cestui que trust* as they shall deem judicious, and there is no pro-

vision as to the disposition of the remainder, and the *cestui que trust* dies before the executors have settled their accounts, they are entitled, as trustees, to commissions only upon the amount actually expended by them for the support of the *cestui que trust*. Matter of Clinton.....557

Where the residue is left to executors and trustees in trust to pay the income to certain persons for life, with remainder over, and with full power of sale, they hold the legal title to the real estate as trustees, and as such are entitled to commissions not only upon the rents, but on the value of the property also. Matter of Martens.....608

See COMMISSIONS; EXECUTORS.

TRUSTS—

A provision leaving the disposal and division of the property to the judgment of the executor, the same "to be sold or held as he may deem best for the interest of my heirs," does not create a trust, but only confers a power of sale on the executor, to be exercised in his discretion. Matter of Spears.....205

UNDUE INFLUENCE—

Two hours before the death of a man aged sixty, who had been suffering from Bright's disease, he made a will by which he gave his entire estate to his third wife, to the exclusion of his children by his former wives. The wife had property of her own, was strong mentally and physically, and had frequently importuned him to make a will, which he refused to do. She sent for the scrivener and witnesses, and gave him a stimulant, before the will was drawn. No other member of the family was present. Held, that testamentary capacity and want of undue influence were not shown. Matter of Nolte.....195

Where there is no proof that anyone suggested to testator the dispositions contained in the will, and they conform to his expressed intentions, the mere fact that the principal beneficiary had the opportunity, and even the motive, to secure the largest share of the property does not import the exercise of undue influence. Matter of Seagrist.....210

Undue influence will not be presumed from the mere existence of the relation of master and servant between the testatrix and legatee, where it appears that they were rela-

tives, sustained close and friendly relations, that the services of testatrix were performed voluntarily, from motives of love and affection, and that she received no salary. *Matter of Murphy*.....466

Influence is not undue if it is a reasonable argument, suggestion, advice, persuasion or urging one's personal claims upon the bounty of another. *Matter of Halbert*..476

A minor who had long been an invalid gave, by her will, all her estate to her aunt, who was her guardian, to the exclusion of her brother. The aunt was present when the will was executed, and it appeared that she had misappropriated funds of the minor's estate, which the court had ordered advanced for specific purposes. *Held*, that the facts showed the exercise of undue influence. *Matter of Carland*.486

See PROBATE.

VESTED ESTATES—

By testator's will a certain sum was given to the executor in trust to pay the income to one of testator's daughters during her life, and on her death to pay the principal to her children. A similar sum was given to each of his daughters. *Held*, that the gift to the grandchildren was absolute and vested at testator's death. *Matter of Ball*...227

A will gave the property to the executors in trust during the life of the widow, and on her death to sell the real estate and divide the proceeds among the children. It further provided that if a son reformed before he reached a certain age the principal of his share should be given to him; otherwise it should be paid to his heirs on his death. The son died before he received the principal, leaving a will giving his share to his brother. *Held*, that his share was not vested so as to pass under his will, but went to his heirs. *Matter of Keenan*.....450

WIDOW—

Where the appraisers fail to set apart the statutory allowance to the widow, an amendment of the inventory is not requisite; but the error may be corrected on the final settlement. *Matter of Maack*.....299

The widow's right to support for forty days is not limited to the amount set apart for her in the inventory, but she is

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entitled to reasonable sustenance for that period. *Matter of Wachter* 55

WILL—

A bequest of the use of property to decedent's husband during his life, followed by the expression of a wish that at his death the property be divided between nephews and nieces, gives a mere life estate to the husband, with remainder to the nephews and nieces. *Matter of Metcalfe*. 10

Where a bequest of income provides that "if she shall need the personal property for her comfort, maintenance and support, she may use the whole or any part thereof," her power of disposition is not absolute, but conditional on her needs, and a remainder over is not repugnant. *Matter of Wyatt*..... 10

The residue, upon the death of the widow, was given to the children of testator's deceased brothers and sisters and the children of his wife's deceased sisters, "so that each of our said nephews and nieces shall take an equal share." *Held*, that the children of the sisters of testator and his wife who were living at the latter's death were not entitled to take. *Id.*

A bequest to a nephew conditioned that he should care for the widow and treat her "as a son would treat a mother caring for her and doing for her as she shall reasonably desire," does not require him to pay for a trained nurse during her sickness, especially where she makes no request therefor. *Id.*

The validity of a will is governed by the law of the testator's domicile at the time of his death. *Matter of O'Connell*..... 11

Presentation of the will to the witnesses with the signature in plain sight is a sufficient acknowledgment. *Matter of Lang* 127

A paper containing disposing clauses cannot be made part of a valid will by a reference thereto in the will. *Matter of Sanderson*..... 139

The fact that a valid will refers to a paper which cannot be identified does not nullify the will. *Id.*

Two or more persons can execute valid separate wills, although contained in the same instrument, provided that

et all the requisites of the statute are complied with by each.
 § Matter of Raupp.....151

The use of all testator's real and personal property was given to two sons for life, and the will then provided that "After the death of my two sons and their heirs, if they have any," the property was given to testator's brothers and sisters. *Held*, that it was testator's intention that only in the event of the extinction of lineal descendants the property should go to the collateral relatives, and that on the death of the sons the grandchildren took an absolute fee. Matter of Stafford.....230

Testatrix's will gave the balance of moneys to her credit in bank, after the payment of prior legacies, to a charitable association. At the time of making the will, and at her death, there was not enough money in bank to pay the legacies, but the president of the bank had in his hands securities in which he had invested her moneys as her financial agent. *Held*, that the words "moneys in bank" included such securities. Matter of Stone.....461

It is not necessary that a will should contain a clause declaring that it is a will. Matter of Buchan.....578

A paper directing the payment of funeral expenses and legacies, appointing an executor and attested by two witnesses, is a will. *Id.*

See REVOCATION.

WITNESS—

See EVIDENCE.

WITNESS TO WILL—

A person who is unable to see is incompetent to act as an attesting witness. Matter of Losee.....290

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